

## **The Employment of Workers with Disabilities At Special Minimum Wages Fact Sheet**

### **Fact Sheet #39: The Employment of Workers with Disabilities at Special Minimum Wages**

This fact sheet provides general information concerning the application of section 14(c) of the Fair Labor Standards Act (FLSA). [www.dol.gov/compliance/laws/comp-flsa.htm](http://www.dol.gov/compliance/laws/comp-flsa.htm)

#### **Characteristics**

Section 14(c) of the FLSA authorizes employers, after receiving a certificate from the Wage and Hour Division, to pay special minimum wages - wages less than the Federal minimum wage - to workers who have disabilities for the work being performed. The certificate also allows the payment of wages that are less than the prevailing wage to workers who have disabilities for the work being performed on contracts subject to the McNamara-O'Hara Service Contract Act (SCA) and the Walsh-Healey Public Contracts Act (PCA).

A worker who has disabilities for the job being performed is one whose earning or productive capacity is impaired by a physical or mental disability, including those relating to age or injury. Disabilities which may affect productive capacity include blindness, mental illness, mental retardation, cerebral palsy, alcoholism and drug addiction. The following, taken by themselves, are not considered to be disabilities for purposes of paying special minimum wages: education disabilities, chronic unemployment, receipt of welfare benefits, nonattendance at school, juvenile delinquency, and correctional parole or probation.

Section 14(c) does not apply unless the disability actually impairs the worker's earning or productive capacity *for the work being performed*. The fact that a worker may have a disability is not in and of itself sufficient to warrant the payment of a special minimum wage.

#### **Coverage**

Any person who works on or otherwise handles goods that are moving in interstate commerce is individually subject to the minimum wage and overtime requirements of the FLSA. In addition, employees of enterprises operated for a business purpose that have an annual dollar volume of sales or business done of at least \$500,000 are also subject to the FLSA's requirements. Furthermore, employees of public agencies; hospitals; institutions primarily engaged, in the Act's own words, "in the care of the sick, the aged, or the mentally ill or defective who reside on the premises;" schools for children who have disabilities; or preschools, elementary or secondary schools, or institutions of higher education are covered on an enterprise basis regardless of the annual dollar volume of the employer.

## **Requirements**

### **Certification**

Employers must obtain an authorizing certificate from the Wage and Hour Division prior to paying special minimum wages to employees who have disabilities for the work being performed. Employers shall submit a properly completed application (Form WH-226-MIS, Application for Authority to Employ Workers with Disabilities at Special Minimum Wages; available on the Internet at <http://www.dol.gov/esa/forms/whd/wh226.pdf>) and the required supporting documentation to: United States Department of Labor, Employment Standards Administration, Wage and Hour Division, 230 South Dearborn Street, Room 524, Chicago, Illinois, 60604-1591; (312) 353-7246. Certificates covering employees of work centers and patient workers normally remain in effect for two years. Certificates covering workers with disabilities placed in competitive employment situations or School Work Exploration Programs (SWEPs) are issued annually.

### **Commensurate Wage Rates**

Special minimum wages must be commensurate wage rates - based on the worker's individual productivity, no matter how limited, in proportion to the wage and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the geographic area from which the labor force of the community is drawn. The key elements in determining commensurate rates are:

Determining the standard for workers who do not have disabilities, the objective gauge against which the productivity of the worker with a disability is measured.

Determining the prevailing wage, the wage paid to experienced workers who do not have disabilities for the same or similar work and who are performing such work in the area. Most SCA contracts include a wage determination specifying the prevailing wage rates to be paid for work on the SCA contract.

Evaluating the quantity and quality of the productivity of the worker with the disability.

All special minimum wages must be reviewed and adjusted, if appropriate, at periodic intervals. At a minimum, the productivity of hourly paid workers must be reevaluated every six months and a new prevailing wage survey must be conducted at least every twelve months.

### **Overtime, Child Labor and Fringe Benefits**

Generally, workers subject to the FLSA, SCA, and/or PCA must be paid at least 1 1/2 times their regular rate of pay for all hours worked over 40 in a workweek.

Minors younger than 18 years of age must be employed in accordance with the child labor provisions of the FLSA and PCA. Neither the FLSA nor PCA have provisions requiring the payment of fringe benefits. Workers paid special minimum wages, however, must receive the **full** fringe benefits listed on the wage determination when performing work subject to the SCA.

## **Enforcement**

The Wage and Hour Division is responsible for the administration and enforcement of the FLSA. In addition, any worker with a disability paid at special minimum wages, or his/her parent or guardian, may petition the Administrator of the Wage and Hour Division for a review of their special wage rates by a Department of Labor Administrative Law Judge.

## **Worker Notification**

Each worker with a disability and, where appropriate, the parent or guardian of such worker, shall be informed orally and in writing by the employer of the terms of the certificate under which such worker is employed. In addition, employers must display the Wage and Hour Division poster, *Notice to Workers with Disabilities Paid at Special Minimum Wages* (WH Publication 1284), available on the Internet at: <http://www.dol.gov/esa/regs/compliance/posters/disab.htm>.

## **Where to Obtain Additional Information.**

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

**For additional information, visit our Wage-Hour website:**  
<http://www.wagehour.dol.gov> and/or call our Wage-Hour toll-free information and helpline, available 8am to 5pm in your time zone, 1-866-4USWAGE (1-866-487-9243).

## **Fact Sheet #39A: How to Obtain a Certificate Authorizing the Payment of Special Minimum Wages to Workers with Disabilities under Section 14(c) of the Fair Labor Standards Act (FLSA)**

This Fact Sheet provides general information concerning the establishment of prevailing wages and commensurate wages as they pertain to the employment of workers with disabilities at special minimum wages. Please read Fact Sheet # 39, *The Employment of Workers with Disabilities at Special Minimum Wages*, for an overview of the general provisions of FLSA Section 14(c) (<http://www.dol.gov/esa/regs/compliance/whd/whdfs39.htm>). Please consult the Regulations, 29 CFR Part 525, *Employment of Workers with Disabilities under Special Certificates*, for detailed information concerning Section 14(c). These

Regulations may be found at  
[http://www.dol.gov/dol/allcfr/ESA/Title\\_29/Part\\_525/toc.htm](http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_525/toc.htm).

### **What is the difference between a certified and a noncertified employer?**

Employers who are certified - who have received a certificate from the U. S. Department of Labor - may choose to pay special minimum wages (SMW) to workers who have disabilities when those disabilities diminish their productivity for the work being performed. A SMW will be lower than the applicable minimum wage required by the FLSA, except in certain cases when the work being performed is subject to the McNamara-O'Hara Service Contract Act (SCA). Without a current certificate, employers must pay workers with disabilities at least the applicable FLSA minimum wage or SCA prevailing wage, where appropriate, for all covered work, regardless of the productivity of the workers.

### **Where and how do I apply for a certificate?**

Employers wishing to obtain a certificate under Section 14(c) must complete and submit the following forms, along with certain required supporting documentation:

Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (Form WH-226). Using this form, the applicant reports information regarding the work that will be performed, the prevailing wage surveys conducted by the employer, and the productivity evaluations conducted to establish the commensurate pay rates the firm pays the workers with disabilities. If workers with disabilities will be paid a SMW for work subject to the McNamara-O'Hara Service Contract Act (SCA), data must also be provided regarding such contract work.

Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (Form WH-226A). This form requires the applicant to list the names of the individuals that will be paid SMWs, identify the disabilities that impair their productivity, and report their average earnings. A separate WH-226A must be submitted for each branch establishment (physically separate location) at which employees with disabilities will receive SMWs.

Instructions for completing the above forms are included on the last page of each form. The forms may be obtained from any Wage and Hour Division Office (addresses may be found in the blue pages of the telephone directory). In addition, these forms may be viewed and "downloaded" from the Wage and Hour Division Homepage on the Internet at  
<http://www.dol.gov/esa/forms/whd/index.htm#WH-226>.

## **Where do I submit my completed application?**

The Midwest Regional Office of the Wage and Hour Division is the only office that processes applications under Section 14(c) and issues certificates authorizing the payment of SMWs to workers with disabilities. Completed applications must be mailed to the following address: U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, 230 South Dearborn Street, Room 524, Chicago, Illinois 60604-1591.

## **What types of certificates are issued and how long do they remain in effect?**

Certificates under section 14(c) are issued to employers on an establishment basis. The certificates will indicate whether the establishment is a work center, also known as community rehabilitation program; a hospital/residential care center (a facility that employs patient workers); a business establishment that is not a work center or an employer of patient workers; or a School Work Experience Program (SWEP).

**Work centers** - formerly referred to as "sheltered workshops" - historically have provided rehabilitation services, day treatment, training, and employment opportunities at their facilities to individuals with disabilities. Work centers need submit only one application (WH-226), but must include a separate supplemental sheet (WH-226A) for each physically separate branch location where workers with disabilities are employed at SMWs. The Wage and Hour Division will issue separate certificates for each location. Work center certificates remain in effect for two years.

**Hospitals/residential care facilities** which employ patient workers may be issued certificates authorizing the payment of SMWs. These certificates remain in effect for two years. If the facility also operates a work center, however, it must apply for a separate certificate for the work center. If the hospital or residential care facility places patients in jobs at business establishments in the community, it must either obtain a work center certificate or ensure that the business establishment has its own certificate if those workers are to receive SMWs.

A **business establishment** (not a work center or a hospital/residential care facility) that chooses to employ workers with disabilities as SMWs must also obtain a certificate from the Department of Labor. If the employer has multiple establishments, a certificate must be obtained for each establishment in which workers with disabilities will be employed at SMWs. Business establishment certificates expire annually. But if an individual with a disability is placed at a business by a work center, supervised by work center staff, and carried on the work center's payroll, the business establishment need not obtain a certificate - the authorization to pay a SMW to the worker will stem from the certificate held

by the work center. Such placements are sometimes called "supported employment" or "an enclave" worksite.

**School Work Exploration Programs (SWEP)** place students with disabilities who receive SMWs at work sites in the community. Certificates for this program are issued to the school administering the program and expire annually.

### **Do certificates expire?**

Certificates are issued with both an effective date and an expiration date. The certificate, along with the employer's authorization to pay special minimum wages, will expire on the indicated date unless the employer properly files an application for renewal with the Wage and Hour Division before the expiration date. If an application for renewal has been properly and timely filed, an existing special minimum wage certificate shall remain in effect until the application for renewal has been granted or denied. Should a certificate to pay special minimum wages expire and no application of renewal has been properly and timely filed, an employer would be required to pay all workers covered by the FLSA at least the full minimum (or where applicable, the full McNamara-O'Hara Service Contract Act prevailing wage) for all work performed after the certificate expiration date.

### **How are existing certificates renewed?**

An expiration date is printed on each certificate. Approximately two months before a certificate expires, the employer will be notified by the Wage and Hour Division that it is time to apply for a new certificate. Renewal applications are submitted on the same forms (WH-226 and WH-226A) and in the same manner as the initial application. If the renewal application is properly filed with the Wage and Hour Division before the existing certificate expires, the employer's existing authority to pay SMWs continues in effect until the renewal application is either granted or denied.

### **How are applications for certification processed?**

Department of Labor Wage Specialists, employed by the Wage and Hour Division's Midwest Regional Office located in Chicago, Illinois, will review each application for completeness, accuracy and compliance with the provisions of the FLSA, including Section 14(c). Once these criteria have been met, the certificate will be issued and mailed to the applicant. In an effort to expedite issuance of the certificate, the reviewing Wage Specialist frequently will contact an applicant by telephone for clarification or to request required supporting documentation. All submitted materials are reviewed to ensure each applicant understands the requirements of Section 14(c) and has achieved and maintained compliance with the provisions of the FLSA. Occasionally, based on the information provided on

the application, the Wage Specialists will identify and supervise the payment of back wages due workers with disabilities.

### **What if I have questions as I complete the application?**

Both the WH-226 and the WH-226A include detailed instructions. Read them carefully. However, if you still have questions, you may wish to contact the Certification Team member who covers your state.

(312) 596-7198: California (business establishments and schools only), Colorado, Delaware, District of Columbia, Florida, Guam, Illinois, Indiana, Iowa, Kansas, Maine, New Jersey, North Dakota, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, the Virgin Islands, and Virginia.

(312) 596-7200: Alabama, Arkansas, California (community rehabilitation centers and hospital/residential care facilities only), Hawaii, Idaho, Louisiana, Maryland, Michigan, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, South Carolina, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

(312) 596-7202: Alaska, Arizona, Connecticut, Georgia, Kentucky, Massachusetts, Minnesota, Mississippi, Montana, New Mexico, New York, Ohio, Oregon, South Dakota, Texas, and Vermont.

### **What can an employer do to expedite the certification process?**

Designate an individual within your organization who understands both the certification and compliance principles of Section 14(c) to oversee the creation and submission of the application.

Submit a complete, accurate and timely application that includes all the required supporting documentation.

Communicate with the Wage and Hour Division Section 14(c) Certification Team before, during and after the submission of the application.

Communicate with your local Wage and Hour Division Office concerning interpretations of the regulations and enforcement (non-certification) issues. These offices can be found in the blue pages of your telephone directory. You may also call 1-866-4US-WAGE (1-866-487-9243).

### **Can my application/renewal application be denied or my certificate be revoked?**

Yes. The granting of a certificate is not a statement of compliance by the Wage and Hour Division. Possession of a certificate does not convey a good faith defense should violations of the law occur. A certificate will be denied if the application is incomplete, makes false statements, or does not include the proper supporting documentation and attestations. If denied, the applicant will be advised in writing and told the reasons for the denial as well as the right to

petition under 29 CFR Part 525.18. SMW certificates may be revoked or an application to renew an existing certificate may be denied if it is found that false statements were made or facts were misrepresented in obtaining the certificate; any of the provisions of the FLSA, SCA, or the terms of the certificate have been violated; or it is determined that the certificate is no longer necessary to prevent the curtailment of employment opportunities for workers with disabilities. Except in cases of willfulness or those in which the public interest requires otherwise, before an application for renewal is denied facts or conduct which may warrant such actions shall be called to the attention of the employer in writing and such employer shall be afforded an opportunity to demonstrate or achieve compliance with all legal requirements.

**Can an employer whose certificate has been revoked or renewal application denied appeal these actions?**

Yes. Any person aggrieved by any action of the Administrator of the Wage and Hour Division having to do with the issuance of certificates under Section 14(c) of the FLSA may file with the Administrator, within 60 days of the action, a petition for review. Such review, if granted, shall be made by the Administrator. Other interested parties, to the extent it is deemed appropriate, may be afforded an opportunity to present data and views.

**How can I obtain more information about Section 14(c) and other provisions of the FLSA?**

For more information about these provisions, review the other Fact Sheets in this series which address Section 14(c) compliance issues located at <http://www.dol.gov/esa/regs/compliance/whd/whdcomp.htm> or call your local Wage and Hour Division Office. These offices can be found in the blue pages of your telephone directory. You may also call 1-866-4US-WAGE (1-866-487-9243). For more information about other laws enforced by the Wage and Hour Division, visit our *e-laws Advisor* at: <http://www.dol.gov/elaws/flsa.htm>.

**This fact sheet is intended as general information only and does not carry the force of legal opinion.**

The Department of Labor is providing this information as a public service. This information and related materials are presented to give the public access to information on Department of Labor programs. You should be aware that, while we try to keep the information timely and accurate, there will often be a delay between official publications of the materials and the modification of these pages. Therefore, we make no express or implied guarantees. The *Federal Register* and the *Code of Federal Regulations* remain the official source for regulatory information published by the Department of Labor. We will make every effort to correct errors brought to our attention.

## **Fact Sheet #39B: Prevailing Wages and Commensurate Wages under Section 14(c) of the Fair Labor Standards Act (FLSA)**

This Fact Sheet provides general information concerning the establishment of prevailing wages and commensurate wages as they pertain to the employment of workers with disabilities at special minimum wages. Please read Fact Sheet # 39, The Employment of Workers with Disabilities at Special Minimum Wages, for an overview of the general provisions of FLSA Section 14(c) (<http://www.dol.gov/esa/regs/compliance/whd/whdfs39.htm>). Please consult the Regulations, 29 CFR Part 525, Employment of Workers with Disabilities under Special Certificates, for detailed information concerning Section 14(c). These Regulations may be found at [http://www.dol.gov/dol/allcfr/ESA/Title\\_29/Part\\_525/toc.htm](http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_525/toc.htm).

### **What is a commensurate wage?**

A **commensurate wage** is a special minimum wage paid to a worker with a disability that is based on his or her individual productivity (no matter how limited) in proportion to the productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the vicinity where the worker with a disability is employed. The commensurate wage in the context of work subject to Section 14(c) is always less than the applicable minimum wage required by section 6(a) of the FLSA, or where applicable, the prevailing wage required by a McNamara-O'Hara Service Contract Act (SCA) Wage Determination.

### **How does an employer determine the proper commensurate wage for each employee with a disability?**

In order to determine the commensurate wage, the employer must first examine the work to be performed by the employee with a disability, and through the use of an accepted work measurement technique, develop a "**standard**" that accurately measures the quality and quantity of that same work when performed by workers who do not have disabilities. Work measurement methods, such as time studies, Modular Arrangement of Predetermined Time Standards (MODAPTS), and Methods-Time Measurement, are used by employers to determine the length of time it should take a worker who does not have a disability to perform an operation, or element of an operation. The commensurate rate is then determined by comparing the performance of the worker with a disability against that "**standard**." In very simple terms, if the worker with a disability is 60% as productive when performing a particular job as is the experienced worker who does not have a disability performing the exact same job, the commensurate wage for that worker with a disability would be at least 60% of the prevailing wage (the wage rate paid to the experienced worker who does not have a disability).

## **What is a prevailing wage under Section 14(c)?**

The prevailing wage for a particular job performed by a worker with a disability who receives a special minimum wage is the wage paid experienced workers who do not have disabilities performing essentially the same type of work in the vicinity. An employer paying a special minimum wage must be able to demonstrate that the prevailing wage rate used to determine a commensurate wage was objectively determined. Normally, prevailing wage rates are based on the results of surveys conducted by the employer. The prevailing wage is not an entry-level wage or a training wage, but the wage rate paid experienced employees after completion of any training or probationary periods. An experienced worker is one who has learned the basic elements or requirements of the work to be performed, ordinarily by completion of a probationary or training period. Typically, such a worker will have received at least one pay raise after successful completion of the probationary or training period. The prevailing wage may not be lower than the applicable statutory minimum wage as established by section 6(a)(1) of the FLSA or, where applicable, a higher State minimum wage.

## **How does an employer conduct a prevailing wage survey under Section 14(c)?**

To conduct a survey, the employer must obtain wage information for each job classification being performed by workers to be paid a special minimum wage. A brief job description should be prepared that defines the specific job duties, responsibilities and tasks; identifies the types of equipment and supplies used to perform the tasks; lists the types of skills, education or experience levels required; and indicates the location, and days and times of the week the work will be performed.

The employer should obtain wage data from comparable businesses in the vicinity that primarily employ workers who do not have disabilities performing the same work and utilizing similar methods and equipment as used by the worker with a disability. A comparable business is one that either employs a similar number of employees or competes for contracts of a similar size and nature. The appropriate size of the sample - the number of firms surveyed - will depend on the number of firms doing similar work in the vicinity, but normally should include no less than three. The prevailing wage information should be solicited, preferably in writing, and the employer conducting the survey should record the following information regarding each prevailing wage survey contact:

1. date of contact;
2. name, address and phone number of firm contacted;
3. individuals contacted within each firm and the title of each individual;
4. the wage rate information provided and the basis for concluding that each rate submitted was not based upon an entry level position;
5. a brief description of work for which wage information was collected.

After contacting a sufficient number of comparable firms, the employer must average the wage information provided to determine the prevailing wage for a particular job. The employer may use either a weighted or simple average so long as he or she is consistent. See the following example:

| <b>Weighted Average vs. Simple Average</b>  |                   |                           |                                  |
|---|-------------------|---------------------------|----------------------------------|
| <b>Employer</b>   | <b>#Employees</b> | <b>Wage Rate Reported</b> | <b>Gross Wages (#EEs x Wage)</b> |
| XYZ, Inc.   | 99                | \$5.85                    | \$579.15                         |
| ABC, Inc.   | 17                | \$5.95                    | \$101.15                         |
| RST, Ltd.   | 25                | \$6.20                    | \$155.00                         |
| 3 Employers   | 141 Employees     | \$18.00                   | \$835.30                         |
| Weighted Average: $\$835.30 \div 141 \text{ employees} = \$5.92411$ or $\$5.93^*$   |                   |                           |                                  |
| Straight Average: $\$18.00 \div 3 \text{ employees} = \$6.00$   |                   |                           |                                  |
| <p>*Note that in this example the prevailing wage rate is \$5.92411, but the employer rounded it up to \$5.93 per hour. If the employer rounded to \$5.92, he or she would be establishing a prevailing wage rate that is <b>less</b> than the true prevailing wage rate (less by \$0.0041 per hour). The Wage and Hour Division will not normally question computations that are carried out to the fifth decimal point and then <b>rounded up</b> to four decimal places. The employer could, of course, round up (but not merely round off) sooner. For example, .04974 should be rounded to .0498 or .05.</p> |                   |                           |                                  |

**Must all employers of workers with disabilities paid special minimum wages conduct prevailing wage surveys?**

# If an employer's workforce consists primarily of workers who do not have disabilities, the wage rate that the employer pays to his or her experienced workers who do not have disabilities who perform similar work may be adopted as the prevailing wage. Similarly, if an agency or community rehabilitation program places a worker with a disability on the premises of such an employer, the wage paid the employer's experienced workers who do not have disabilities performing similar work may be used as the prevailing wage.

In addition, the prevailing wage for workers with disabilities performing as service employees on contracts subject to the Service Contract Act would be the wage listed for the classification of work being performed on the Department of Labor

Wage Determination included in the contract (if any). If a Wage Determination is included in the contract, all service employees (included those paid special minimum wages) must also receive the full fringe benefits listed on the Wage Determination. *Please see Fact Sheet 39F, The Payment of Special Minimum Wages to Workers with Disabilities Who Are Employed on Federal Service Contracts Subject to the McNamara-O'Hara Service Contract Act*, for more information concerning the Service Contract Act.

Finally, if the employer has a subcontract to perform a job in essentially the same way and with the same type of equipment as the prime contractor, the employer may use as the prevailing wage the wage rate the prime contractor pays to his or her experienced workers.

### **How often must an employer conduct a prevailing wage survey?**

The prevailing wage survey must be conducted prior to paying a special minimum wage. It then must be reviewed and updated at least once a year - more frequently when a change in the prevailing wage has most likely occurred, such as when the FLSA minimum wage or a higher State minimum wage has been increased.

### **A word about the rules of ROUNDING when computing special minimum wages.**

Section 14(c) requires that workers with disabilities for the work performed who receive special minimum wages must receive **at least** the commensurate wage for all hours worked. An employer who follows the normal business rules of rounding - rounding "up" only when the last decimal point is a five or higher - may actually be underpaying workers with disabilities. Although the underpayment per unit produced would be very small, the eventual back wage liability could be quite large considering the number of units that could be produced over an extended period of time by a number of different workers. This can be avoided by carrying computations out to the fifth decimal and then always rounding up to the fourth place. The Wage and Hour Division will accept the practice of carrying out computations to the fifth decimal point and then rounding up to the fourth decimal place as compliance when computing special minimum wages due workers with disabilities under Section 14(c). Of course, an employer may round "up" sooner than the fifth decimal point.

### **How can I obtain more information about commensurate wages, prevailing wages, or other provisions of Section 14(c) and the FLSA?**

For more information about these provisions, review the other fact sheets in this series which address Section 14(c) located at <http://www.dol.gov/esa/regs/compliance/whd/whdcomp.htm> or call your local Wage and Hour Division Office. These offices can be found in the blue pages of

your telephone directory. You may also call 1-866-4US-WAGE (1-866-487-9243). For more information about other laws enforced by the Wage and Hour Division, visit our **e-laws Advisor** at: <http://www.dol.gov/elaws/flsa.htm>.

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### **Fact Sheet #39C: Hours Worked and the Payment of Special Minimum Wages to Workers with Disabilities under Section 14(c) of the Fair Labor Standards Act (FLSA)**

This fact sheet provides general information concerning the FLSA concept of hours worked as it pertains to the employment of workers with disabilities at special minimum wages. Please read Fact Sheet #39, ***The Employment of Workers with Disabilities at Special Minimum Wages***, for an overview of the general provisions of FLSA Section 14(c) (<http://www.dol.gov/esa/regs/compliance/whd/whdfs39.htm>) and Fact Sheet #22, ***Hours Worked Under the Fair Labor Standards Act (FLSA)*** (<http://www.dol.gov/esa/regs/compliance/whd/whdfs22.htm>) for a general overview of the concept of hours worked. Please consult the Regulations, 29 CFR Part 525 (***Employment of Workers with Disabilities under Special Certificates***), and Part 785 (***Hours Worked***) for detailed explanations of both Section 14(c) and the concept of hours worked. These Regulations may be found at [http://www.dol.gov/dol/allcfr/ESA/Title\\_29/Chapter\\_V.htm](http://www.dol.gov/dol/allcfr/ESA/Title_29/Chapter_V.htm)

The general provisions of the FLSA concept of hours worked - determining when an employee is performing work for which he or she must be compensated - apply to workers with disabilities who receive special minimum wages under Section 14(c). But the unique characteristics of the work places operated by employers under Section 14(c) can cause confusion as to when an employee is performing compensable work. This fact sheet addresses several issues that often impact the employment of workers with disabilities.

## **Down Time**

Down time refers to compensable time when the worker with a disability is on the job but is not producing because of factors not within his or her control - such as lack of work, equipment breakdowns, etc. Workers with disabilities, including those paid piece rates, are required to be paid for down time at a rate equal to their average hourly earnings during the most representative period, not to exceed a quarter (calendar or fiscal). An employer must be consistent in the method used when computing the employee's average hourly earnings.

As a practical matter, workers with disabilities employed by Community Rehabilitation Programs are often unable to leave their place of employment because of special transportation arrangements or other reasons unique to their condition. The employer may provide rehabilitation services to workers with disabilities during periods of extended down time and such time need not be considered compensable so long as the services provided are not primarily for the purpose of increasing job productivity; such time is clearly identified, recorded, and segregated on time records; and the services are provided in an area away from the production area.

## **Work Samples and Work Simulations**

Work samples and work simulations are types of rehabilitation services that are structured to resemble the work performed in the employer's facility but are performed away from the normal production area. These activities do not yield a product used to fulfill any of the employer's contracts and the employer does not derive any economic benefit from the product. Such samples and simulations are supervised by non-production personnel and are a specific part of a well-defined program of rehabilitation.

The Wage and Hour Division does not consider work samples or work simulations, as described above, to be hours worked or compensable when performed by workers with disabilities who receive special minimum wages under Section 14(c) provided none of the material, goods, or services produced enters into the stream of commerce by being intermingled with the normal production of the employer. Typically, such materials would be discarded or recycled for future use in work simulation.

## **Travel Time**

The time spent by workers with disabilities being transported to and from the work site and their homes (including group homes and dormitories) by the employer at the beginning and end of the day is not hours worked. Such transportation retains the characteristic of "normal home to work travel" and need not be compensated.

When workers with disabilities report to a centralized pick-up spot to get a ride in their facility's vehicle to a remote job site that may not be readily accessible by public transportation, such transportation retains the characteristic of "normal home to work travel." Such travel does not constitute hours worked so long as the workers with disabilities do not perform any work at the pick-up spot, they do not engage in any task that could be considered an integral part of their principal activity, and they retain the option to transport themselves to the job site. At times, because of their disabilities, the workers' option to transport themselves to the job site may be only theoretical. For example, the worker with a disability may not be eligible for a driver's license or his or her guardian may be unable to provide transportation. The fact that the transportation option is only theoretical does not change the Department's position that such travel is not hours worked nor compensable.

Any time spent in transportation between job sites during the course of the workday is hours worked and the employee shall be paid a wage rate that is at least equal to his or her average hourly earnings during the most recently completed representative period, not to exceed a quarter (calendar or fiscal). An employer must be consistent in the method used when computing the employee's average hourly earnings.

### **Rest Periods and Coffee Breaks**

Although the FLSA does not require rest periods or coffee breaks, it is customary in industry for employees to be given such breaks, which last generally between 5 and 20 minutes. Such breaks are considered to be primarily for the benefit of the employer since they tend to promote the efficiency of the employee and are considered to be working time. Whether or not a worker with a disability receiving special minimum wages must be paid for such break periods depends on the method of compensation. Hourly paid workers must be compensated for breaks at their normal hourly wage. But no additional compensation is due workers with disabilities paid piece rates if the piece rate was properly established because such piece rates include time for personal time, fatigue, and unavoidable delays (PF&D). The PF&D allowance will also take into account the time workers spend on traditional breaks or rest periods. Please see Fact Sheet #39D, **Incorporating Personal Time, Fatigue and Delay (PF&D) Allowances When Determining Piece Rates to be Paid Workers with Disabilities Receiving Special Minimum Wages under Section 14(c) of the Fair Labor Standards Act (FLSA)**, for more information on PF&D.

### **Recording Hours Worked**

The FLSA requires employers to keep records of both the daily and weekly hours worked (see Subpart A of Regulations, 29 CFR Part 516). The employer must also clearly distinguish in its records non-compensable hours from hours that

would be considered hours worked, regardless of the category of non-compensable time involved.

### **How can I obtain more information about the SCA, Section 14(c) and other provisions of the FLSA?**

For more information about these provisions, review the other Fact Sheets in this series which address Section 14(c) compliance issues located at <http://www.dol.gov/esa/regs/compliance/whd/whdcomp.htm> or call your local Wage and Hour Division Office. These offices can be found in the blue pages of your telephone directory. You may also call 1-866-4US-WAGE (1-866-487-9243). For more information about other laws enforced by the Wage and Hour Division, visit our *e-laws Advisor* at: <http://www.dol.gov/elaws/flsa.htm>.

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### **Fact Sheet #39D: Incorporating Personal Time, Fatigue and Delay (PF&D) Allowances When Determining Piece Rates to be Paid Workers with Disabilities Receiving Special Minimum Wages under Section 14(c) of the Fair Labor Standards Act (FLSA)**

This Fact Sheet provides general information concerning the establishment of prevailing wages and commensurate wages as they pertain to the employment of workers with disabilities at special minimum wages. Please read Fact Sheet # 39, The Employment of Workers with Disabilities at Special Minimum Wages, for an overview of the general provisions of FLSA Section 14(c) (<http://www.dol.gov/esa/regs/compliance/whd/whdfs39.htm>). Please consult the Regulations, 29 CFR Part 525, Employment of Workers with Disabilities under Special Certificates, for detailed information concerning Section 14(c). These Regulations may be found at [http://www.dol.gov/dol/allcfr/ESA/Title\\_29/Part\\_525/toc.htm](http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_525/toc.htm).

## **What is PF&D?**

Normal fatigue prevents all employees, not just those with disabilities, from producing at their most rapid pace throughout the workday. In addition, breaks, cleanup time, and delay time while materials are being restocked or the finished products are removed all reduce the amount a worker can produce. Employers must take this nonproductive time into consideration when determining piece rates used to compute special minimum wages by including what is known as a Personal Time, Fatigue, and Delay (PF&D) Factor. Regulations, 29 CFR Part 525.12(h)(2)(ii), states that when determining piece rates "appropriate time shall be allowed for personal time, fatigue, and unavoidable delays. Generally, not less than 15% allowances (9 - 10 minutes per hour) shall be used in conducting time studies." The Wage and Hour Division will not accept a PF&D allowance that is less than 9 minutes per hour. A PF&D allowance is required only when establishing piece rates. The regulations do not require that an employer include a PF&D allowance when determining commensurate hourly wages to be paid to workers with disabilities under Section 14(c) of the FLSA.

## **How does an employer incorporate a proper PF&D allowance into a piece rate?**

The PF&D allowance can be properly incorporated when determining the piece rates to be paid workers with disabilities in several different ways.

1. The simplest method is to conduct time studies of the standard setters (workers who do not have disabilities for the work performed) for 25 minutes, and then multiply the number of completed units by 2. Averaging those results will yield the standard - the number of units that an experienced worker without disabilities would be expected to produce in an hour with a properly computed 10-minute PF&D. The piece rate is then obtained by dividing the hourly prevailing wage rate for the work by the standard. For a 9-minute PF&D, the standard setters would be timed for 25½ minutes.
  - Example: Suppose that an employer must establish a piece rate to determine the wages due workers with disabilities paid special minimum wage who are employed to produce a specific product requiring hand assembly. The employer has already conducted a survey and determined that the prevailing wage rate for that work in the vicinity is \$8.00 an hour. By conducting time studies of three experienced workers who do not have disabilities for the work being performed for 25 minutes and averaging the number of completed units produced, the employer determined that the average number of units produced in 25 minutes was 40. Therefore, the standard for this job, using a 10-minute PF&D, is 80 units. The employer would then divide the prevailing wage rate

- (\$8.00) by the standard (80 units) to determine a piece rate of \$0.10.
2. An employer could apply an allowance factor to incorporate a proper PF&D. This is accomplished by multiplying the standard time it takes a worker who does not have a disability to produce one unit (or complete one cycle) by an allowance factor of 1.20 for a 10 minute PF&D or 1.1764705 for a 9-minute PF&D.
    - Example: Continuing the example above where the standard setters produced 40 units in 25 minutes, it can be determined that it took 37.5 seconds to produce a single unit. By multiplying 37.5 seconds by the allowance factor of 1.20, the time it took to produce a single unit is increased to 45.0 seconds - an amount that includes a 10-minute per hour PF&D. The number of seconds in an hour (3600) is then divided by 45.0 seconds to yield the number of units that a worker who is not disabled for the work being produced would be expected to produce in an hour that included a 10-minute PF&D.  $3600 \text{ seconds} / 45 \text{ seconds} = 80 \text{ units}$ , the same number of units as determined in the example above. The employer would again divide the prevailing wage rate (\$8.00) by the standard (80 units) to determine a piece rate of \$0.10.
      - **Note: Some employers mistakenly believe that by multiplying the standard time by an allowance factor of 1.15, they are providing a PF&D allowance of 15%, or 9 minutes. This actually incorporates a PF&D of less than 9 minutes and is not in compliance with the regulations, 29 CFR Part 525. An allowance factor of at least 1.1764705 must be used to incorporate an acceptable PF&D when determining piece rates.**
  3. An employer could multiply the number of units produced in 60 minutes by the worker who does not have a disability by an allowance percentage of 85% for a 9 minute PF&D or 83.3334% for a 10-minute PF&D. Example: Suppose the standard setters in the previous two examples had been timed for an hour and the average production was 96 units. If the employer multiplied the 96 units by the allowance percentage of 83.3334% (.833334) to allow for a 10-minute PF&D, the standard would be 80 units. The employer would again divide the prevailing wage rate (\$8.00) by the standard (80 units) to determine a piece rate of \$0.10.

### **A word about the rules of ROUNDING when computing special minimum wages.**

Section 14(c) requires that workers with disabilities for the work being performed who receive special minimum wages must receive at least the commensurate wage for all hours worked. An employer who follows the normal business rules of rounding - rounding "up" only when the last decimal point is a five or higher - may actually be underpaying workers with disabilities. Although the underpayment per

unit produced would be very small, the eventual back wage liability could be quite large considering the number of units that could be produced over an extended period of time by a number of different workers. This can be avoided by carrying computations out to the fifth decimal and then always rounding up to the fourth place. The Wage and Hour Division will accept the practice of carrying out computations to the fifth decimal point and then rounding up to the fourth decimal place as compliance when computing special minimum wages due workers with disabilities under Section 14(c).

An easy check to ensure that you have properly "rounded" when computing piece rates to be paid workers with disabilities under Section 14(c) is to multiply the piece rate by the standard. If this figure does not equal or exceed the prevailing wage rate, an error in the computation has occurred. In our example, \$.010 multiplied by 80 units equals the prevailing wage rate of \$8.00. Had that figure been less than \$8.00 - such as \$7.998 - the workers with disabilities would be receiving less than required by Section 14(c).

### **How can I obtain more information about the SCA, Section 14(c) and other provisions of the FLSA?**

For more information about these provisions, review the other Fact Sheets in this series which address Section 14(c) compliance issues located at <http://www.dol.gov/esa/regs/compliance/whd/whdcomp.htm> or call your local Wage and Hour Division Office. These offices can be found in the blue pages of your telephone directory. You may also call 1-866-4US-WAGE (1-866-487-9243). For more information about other laws enforced by the Wage and Hour Division, visit our *e-laws Advisor* at: <http://www.dol.gov/elaws/flsa.htm>.

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## **Fact Sheet #39E: Determining Hourly Commensurate Wages to be Paid Workers with Disabilities under Section 14(c) of the Fair Labor Standards Act (FLSA)**

This Fact Sheet provides general information concerning the establishment of prevailing wages and commensurate wages as they pertain to the employment of workers with disabilities at special minimum wages. Please read Fact Sheet # 39, The Employment of Workers with Disabilities at Special Minimum Wages, for an overview of the general provisions of FLSA Section 14(c) (<http://www.dol.gov/esa/regs/compliance/whd/whdfs39.htm>). Please consult the Regulations, 29 CFR Part 525, Employment of Workers with Disabilities under Special Certificates, for detailed information concerning Section 14(c). These Regulations may be found at [http://www.dol.gov/dol/allcfr/ESA/Title\\_29/Part\\_525/toc.htm](http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_525/toc.htm).

### **How may a certified employer determine an hourly commensurate wage rate for a worker with a disability that impairs the employee's productivity for the work being performed?**

The employer must first develop a complete analysis of the work that is to be performed by the worker with a disability. It is important to consider all of the tasks to be performed; the method, materials and equipment to be used; and any other factors that may affect the work (such as the location, the time of day, the need to work in extreme heat, etc.).

Determine and define the minimum quality and quantity standards that must be met by the worker(s) performing the job (discussed further below). These standards must be applied equally to both the workers who have disabilities for the work being performed and those workers who do not have disabilities for the work being performed.

Determine the prevailing wage for the work to be performed. In order to pay a commensurate wage, the employer must first determine the wage that prevails in the vicinity for essentially the same type, quantity, and quality of work when performed by an experienced worker who does not have a disability. See Fact Sheet #39B, *Prevailing Wages and Commensurate Wages under Section 14(c) of the Fair Labor Standards Act (FLSA)*, for a discussion on how to determine prevailing wage rates.

Determine the "standard" for the job - which reflects the productivity, in terms of quality and quantity, of an experienced worker who does not have a disability - through an accepted method of industrial work measurement. Such methods may include stopwatch time studies, predetermined time systems, or standard data or other recognized measurement methods. It is imperative that the work measurement method include all aspects of the job that will be performed by the

workers with disabilities and utilize both the quality and quantity standards developed for the job.

Evaluate, in terms of quality and quantity, the productivity of each individual worker with a disability as he or she performs the exact same job for which the standard was established in the above step. **Behavioral factors - such as personal appearance and hygiene, promptness, social skills, willingness to follow orders, etc. - may not be used when evaluating the worker's productivity.**

Determine the relative productivity level of each worker with a disability and compare it to the standard established by the worker who does not have a disability. Apply this percentage to the prevailing wage to determine that worker's commensurate wage. Simply put, if the prevailing wage is \$8.00 per hour and the worker with a disability receives a 60% productivity rating, the commensurate wage for that worker would be \$4.80 per hour (\$8.00 multiplied by 60%).

**How often must an employer evaluate the productivity of a worker with a disability who is paid an hourly wage rate?**

An initial evaluation of a worker's productivity must be made within the first month after employment begins. An employer must thereafter evaluate the productivity of each worker with a disability who is paid an hourly commensurate wage rate at least every 6 months, or whenever there is a change in the methods or materials used or the worker changes jobs. These reviews must be conducted in a manner and frequency to insure payment of commensurate wages. The results of each evaluation shall be properly recorded and the worker's wages shall be adjusted no later than the first complete pay period following the evaluation.

**Does the Department of Labor require the use of any particular work measurement method when evaluating productivity levels?**

No, but the work measurement method must be verifiable through the use of established industrial work measurement techniques. For example, Wage and Hour accepts such methods as stopwatch time studies, Methods-Time Measurement (MTM) and Modular Arrangement of Predetermined Time Standards (MODAPTS). Whatever work measurement method is used, neither the standard setter nor the worker with a disability may be evaluated before having the opportunity to become familiar with the job or at a time when the worker is fatigued or subject to conditions that result in less than normal productivity. It is recommended that at least three different workers who do not have disabilities for the work being performed be evaluated and that their individual productivity ratings be averaged to determine the standard. Such averaging, although not required by the Regulations, 29 CFR Part 525, takes into consideration that even experienced workers work at different paces.

### **What if the job includes several varied tasks and the employer wants to pay only one hourly rate?**

If the job includes several varied tasks, the employer may perform a work measurement on each task and arrive at an overall standard by weighting each task by the proportion of time spent performing that task.

For example if the productivity rating (incorporating both quality and quantity) of a worker with a disability was 30% in one task and 50% in another, and the established standard determined that each task took 50% of the total time, the rating of the worker with a disability would be 40% (30% + 50% divided by 2). If the prevailing wage were \$10.00, the commensurate rate would be \$4.00 (\$10.00 multiplied by 40%).

### **What is factoring and is it an acceptable practice?**

Factoring is the work measurement method of breaking a job into its components, as described above, and then rating the worker on each individual component. Employers often use factoring when establishing commensurate wage rates. The Wage and Hour Division accepts factoring as a valid method of work measurement under Section 14(c), as long as the employer rates workers only on the job components actually performed. The employer may not penalize a worker because he or she fails to perform, or is incapable of performing, a certain component(s) of the job. For example, an employer would be improperly "factoring" if he or she included a rating of "zero" for a task that the employee, for whatever reason, did not perform. Such factoring would significantly reduce the employee's rating and, thus, his or her commensurate wages. In addition, the employer would be evaluating the employee for a job he or she would not actually be performing in the future - as it can be reasonably expected that the employer did not intend to pay the worker to "idly sit by" and not perform the task for which a "zero rating" was assigned.

### **Must an employer include a personal fatigue and delay factor (PF&D) when determining hourly commensurate wage rates?**

No, a PF&D allowance does not have to be included when determining hourly commensurate wage rates because hourly workers must be paid for the short breaks and downtime which a PF&D allowance is designed to cover. A PF&D allowance is required by Regulations 29 CFR Part 525 only when calculating piece rates (for more information on PF&D, please see Fact Sheet #39D, *Incorporating Personal Time, Fatigue and Delay (PF&D) Allowances When Determining Piece Rates to be Paid Workers with Disabilities Receiving Special Minimum Wages under Section 14(c) of the Fair Labor Standards Act (FLSA)*). However, evaluations of workers paid on an hourly basis should not be conducted if the worker is "fatigued or subject to conditions that may result in less than normal productivity." The employer may choose to include a PF&D

allowance if the worker cannot be evaluated when he or she is not fatigued or when work conditions are not optimal, or because the employer wishes to pay workers with disabilities wages that exceed the applicable commensurate wage rate.

### **How does an employer take both quality and quantity into account when evaluating worker productivity?**

FLSA section 14(c)(1)(B) and Regulations 29 CFR Part 525 require that the wages paid workers with disabilities be commensurate with those paid experienced workers who do not have disabilities employed in the vicinity for essentially the same type, quality and quantity of work. Two of the more common methods employers use to ensure that both quality and quantity are properly considered are rework and the "90/10 form."

Rework is perhaps the simplest method to ensure that quality and quantity are properly addressed when evaluating the productivity of workers paid by the hour. It requires that the employer accurately define both the minimal acceptable quantity standard (amount of work) and the minimal acceptable quality standard before workers are evaluated. These standards must be predetermined, written, and clearly articulated to the workers before the time studies are conducted. Examples of quality standards for hourly paid jobs could include such things as the number of streaks left on a mirror or window to be cleaned by a janitor, or the number of pieces of mail that were incorrectly sorted by a mail room attendant; or how many "patches" of uncut grass remain on a lawn being mowed by a landscape worker.

The employer then time studies the worker who does not have a disability until the worker indicates that he or she has satisfactorily completed the work. The "clock" is then stopped, the time is recorded, and the work product is examined by the individual(s) conducting the study to ensure that the worker has met the pre-established minimum acceptable quality and quantity standards. If the minimum acceptable standards have been met, the time as recorded is the standard by which the work of the worker with the disability is compared to establish the commensurate wage rate. If either of the minimum acceptable standards is not met, the worker is advised of the shortcoming(s) and the study will resume with the worker performing "rework." The "clock" will again be started and continue ticking while the worker corrects/completes the work product to that point where it meets the minimum acceptable standards. The time spent during the initial study, and all time spent performing rework, are then added together to establish the standard of the worker who does not have a disability.

The worker with a disability is then subjected to an identical time study and held to the exact quality and quantity standards as the worker who does not have a disability. If either of the minimum acceptable standards is not met, the worker is advised of the shortcoming(s) and the study will resume with the worker

performing rework. The "clock" will again be started and continue ticking while the worker corrects/completes the work product to that point that it meets the minimum acceptable standards. The time spent during the initial study, and all time spent performing rework, are then added together and compared to the total time spent by the standard setter (the worker who does not have a disability). The percentage obtained by this comparison is then applied to the prevailing wage in order to determine the commensurate wage. When using the rework method, it is imperative that both the standard setter and the worker with a disability be held to the same minimum acceptable standards of quality and quantity.

**The 90/10 rating form.** The so-called "90/10 form" was developed in response to recommendations made by the now defunct Advisory Committee on Special Minimum Wages. It assigns a 90 percent weight to the quantity of work performed and a 10 percent weight to the quality of work performed. This means that the employer compares the quantity of work performed by the worker with a disability to that of the standard setter and multiplies this figure by 90% and compares the quality of the work performed by the worker with a disability to that of the standard setter and multiplies that by 10%. The two ratings are then added together to determine the overall productivity rating. As with rework, it is imperative that the minimum acceptable standards of both quality and quantity be well defined and communicated to the workers.

The Wage and Hour Division has determined that when properly executed, the 90/10 form, as a general rule, results in the payment of an objectively determined commensurate rate. No such determination has been made for any other method that assigns a higher weight to the quality rating than 10 percent. Employers who wish to do so will be required to submit documentation of sufficient detail to justify such ratings. Applicants will also be required to demonstrate that workers who do not have disabilities earning the prevailing wage when performing essentially the same type of work are also held to such quantity and quality of work standards in the vicinity.

Although not required by the regulations, various forms have been created by employers and interested parties to assist them in performing the 90/10 Rating. The Wage and Hour Division has not officially reviewed or approved any of these forms, but it will accept their use when properly completed. Although the 90/10 methodology was designed for use when "rework" is not included in the time studies, some employers still choose to use the 90/10 rating method even after including rework. In these situations, WH accepts this practice as long as there is no deduction from the quality rating.

Under the 90/10 Rating, the standard setter must meet the pre-established minimum acceptable quality and quantity standards when being time studied. If he or she fails to meet those standards, the employer must either redefine the

standards to comport with the performance of the workers who do not have disabilities or conduct additional time studies to validate the standards.

### **How can I obtain more information about the SCA, Section 14(c) and other provisions of the FLSA?**

For more information about these provisions, review the other Fact Sheets in this series which address Section 14(c) compliance issues located at <http://www.dol.gov/esa/regs/compliance/whd/whdcomp.htm> or call your local Wage and Hour Division Office. These offices can be found in the blue pages of your telephone directory. You may also call 1-866-4US-WAGE (1-866-487-9243). For more information about other laws enforced by the Wage and Hour Division, visit our *e-laws Advisor* at: <http://www.dol.gov/elaws/flsa.htm>.

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### **Fact Sheet #39F: The Payment of Special Minimum Wages to Workers with Disabilities Who Are Employed on Federal Service Contracts Subject to the McNamara-O'Hara Service Contract Act**

This Fact Sheet provides general information concerning the establishment of prevailing wages and commensurate wages as they pertain to the employment of workers with disabilities at special minimum wages. Please read Fact Sheet # 39, The Employment of Workers with Disabilities at Special Minimum Wages, for an overview of the general provisions of FLSA Section 14(c) (<http://www.dol.gov/esa/regs/compliance/whd/whdfs39.htm>). Please consult the Regulations, 29 CFR Part 525, Employment of Workers with Disabilities under Special Certificates, for detailed information concerning Section 14(c). These Regulations may be found at [http://www.dol.gov/dol/allcfr/ESA/Title\\_29/Part\\_525/toc.htm](http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_525/toc.htm).

### **What is the McNamara-O'Hara Service Contract Act (SCA)?**

The SCA is a Federal labor standards statute that applies to every contract entered into by the United States or the District of Columbia, the principal

purpose of which is to furnish services in the United States through the use of service employees. Contractors and subcontractors performing on such Federal contracts must observe minimum wage and safety and health standards, and must maintain certain records, unless a specific exemption applies.

**What wage rates must be paid to service employees employed on contracts subject to the SCA?**

Every service employee performing any of the contract work under a service contract in excess of \$2,500 must be paid not less than the monetary wages and be furnished the fringe benefits which the Secretary of Labor has determined to be prevailing in the locality for the classification of work being performed, or the wage rates and fringe benefits (including any accrued or prospective wage rates and fringe benefits) contained in a predecessor contractor's collective bargaining agreement. The wage rates and fringe benefits required will be specified in the SCA wage determination included in the contract. If no wage determination has been made applicable to the contract, employees performing work under the contract must be paid not less than the minimum wage provided in section 6(a)(1) of the Fair Labor Standards Act (FLSA).

Service contracts that do not exceed \$2,500 are not subject to wage and fringe benefit determinations or to the safety and health requirements of the SCA. However, the SCA does require that employees performing work on such contracts be paid not less than the minimum wage rate provided by section 6(a)(1) of the Fair Labor Standards Act.

**May employers pay workers with disabilities who are performing on SCA contracts special minimum wages (SMW) as is permitted by Section 14(c) of the FLSA?**

Yes. The SCA, like the FLSA, allows an employer to pay employees who have disabilities for the work to be performed a SMW less than the prevailing wage required by the wage determination. Regulations, 29 CFR Part 4.6(o) instructs the employer to follow the same "conditions and procedures" required for the employment of workers with disabilities under section 14(c) of the FLSA. However, this exception is from the prevailing wage only. Employers are still required to pay the full fringe benefits, or the equivalent dollar cash payment in lieu of providing the benefits, to service employees who have disabilities for the work performed.

**Must an employer obtain a certificate from the Department of Labor prior to paying SMWs to workers with disabilities performing on SCA contracts?**

Yes. Employers who wish to pay SMWs to service employees with disabilities performing on contracts subject to the SCA must follow the same certification procedures as employers who perform non-contract work (work not subject to the

SCA). In the past, SCA contract-specific certificates were issued to employers, but that is no longer the case. For more information regarding the certification process, please review the fact sheet in this series that covers Certification.

**How does an employer ensure that his/her service employees performing SCA covered work are properly classified?**

The wage determination that is included in the contract should list all job classifications that may be required in order to perform the contracted services. The definitions for the SCA job classifications are contained in the **SCA Directory of Occupations**, which may be obtained from the Government Printing Office and is also available on the Wage and Hour Division Web site at: <http://www.dol.gov/esa/regs/compliance/whd/wage/main.htm>.

The duties which an employee actually performs governs the classification and the rate of pay to which the employee is entitled under the applicable wage determination.

**How does an employer determine the amount of the SMW that may be paid to a worker with disabilities who is employed as a service employee on a SCA contract?**

A properly computed SMW is a commensurate wage - one that is based on the worker's individual productivity in proportion to the wage and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the vicinity in which the worker with the disability will be employed. When determining the commensurate wage for an employee performing work subject to the SCA, the wage rate listed on the wage determination for the job classification actually performed is the prevailing wage. If no wage determination has been incorporated into the contract, the employer generally would be required to conduct a prevailing wage survey as described in regulations, 29 CFR Part 525.10

**How does an employer determine the amount of fringe benefits to pay service employees performing work subject to the SCA?**

Generally, every covered contract in excess of \$2,500 contains a provision specifying the fringe benefits to be furnished to service employees, and these must be paid in addition to the minimum wage. The fringe benefit amount is listed in the wage determination. SCA makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees. However, temporary and part-time employees are only entitled to an amount of the fringe benefits specified in an applicable determination that is proportionate to the amount of time spent in covered work. In workweeks where employees with disabilities who receive SMWs perform work subject to the SCA,

they must receive the full fringe benefits listed in the wage determination, but only for those hours spent performing work subject to the SCA.

**How does SCA impact other employees who, though employed by an employer that is a contractor on an SCA contract, actually perform no work subject to the SCA?**

Section 6(e) of the FLSA requires an employer who is either a prime contractor or a subcontractor on an SCA contract to pay all employees, **including staff and employees not working on the service contract**, at least the FLSA minimum wage. Therefore, all of a SCA contractor's employees employed at an establishment where SCA work is performed - whether covered under the FLSA or not - must receive at least the FLSA minimum wage for all hours worked. Employers who have obtained the proper certification under section 14(c) may pay a SMW to SCA service employees and other employees not working on the contract who have disabilities for the work being performed.

**Does the SCA require overtime payments to employees who work more than 40 hours in a week?**

No, the SCA has no overtime provisions. But employees may be due overtime under either the FLSA or the Contract Work Hours and Safety Standards Act (CWHSSA). The FLSA requires that all covered and nonexempt employees receive overtime compensation equal to one-half their regular rate of pay for all hours worked in excess of forty in a workweek. CWHSSA also requires additional overtime compensation for all hours worked in excess of forty in a workweek. The overtime requirements of CWHSSA apply to all workers, including those with disabilities, who are performing the duties of laborer, mechanic, guard or watchman on SCA contracts valued in amounts that exceed \$100,000.

**What safety and health standards apply under the SCA?**

No part of the services covered under the SCA will be performed in buildings, surroundings, or under working conditions which are unsanitary, hazardous, or dangerous to the health and safety of services employees.

**Who enforces the SCA?**

The labor standards provisions of the SCA are enforced by the Wage and Hour Division, which is part of the Department of Labor's Employment Standards Administration. The safety and health provisions of the SCA are enforced by the Department of Labor's Occupational Safety and Health Administration (OSHA).

## **What happens if a contractor violates the SCA?**

The Wage and Hour Division conducts investigations of contractors to ascertain compliance with the SCA. The SCA provides authority to withhold contract funds to reimburse underpaid employees, terminate the contract, hold the contractor liable for associated costs to the government, and debar from future government contracts for a period of three years any persons or firms who have violated the SCA.

## **How can I obtain more information about the SCA, Section 14(c) and other provisions of the FLSA?**

For more information about these provisions, review the other Fact Sheets in this series which address Section 14(c) compliance issues located at <http://www.dol.gov/esa/regs/compliance/whd/whdcomp.htm> or call your local Wage and Hour Division Office. These offices can be found in the blue pages of your telephone directory. You may also call 1-866-4US-WAGE (1-866-487-9243). For more information about other laws enforced by the Wage and Hour Division, visit our *e-laws Advisor* at: <http://www.dol.gov/elaws/flsa.htm>.

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### **PART 525— EMPLOYMENT OF WORKERS WITH DISABILITIES UNDER SPECIAL CERTIFICATES**

#### **§ 525.1 Introduction.**

The Fair Labor Standards Amendments of 1986 (Pub. L. 99–486, 100 Stat. 1229) substantially revised those provisions of the Fair Labor Standards Act of 1938 (29 U.S.C. 201) (FLSA) permitting the employment of individuals disabled for the work to be performed (workers with disabilities) at special minimum wage rates below the rate that would otherwise be required by statute. These provisions are codified at section 14(c) of the FLSA and:

(a) Provide for the employment under certificates of individuals with disabilities at special minimum wage rates which are commensurate with those paid to workers not disabled for the work to be performed employed in the vicinity for essentially the same type, quality, and quantity of work;

(b) Require employers to provide written assurances that wage rates of individuals paid on an hourly rate basis be reviewed at least once every six months and that the wages of all employees be reviewed at least annually to reflect changes in the prevailing wages paid to experienced individuals not disabled for the work to be performed employed in the locality for essentially the same type of work;

(c) Prohibit employers from reducing the wage rates prescribed by certificate in effect on June 1, 1986, for two years;

(d) Permit the continuance or establishment of work activities centers; and

(e) Provide that any employee receiving a special minimum wage rate pursuant to section 14(c), or the parent or guardian of such an employee, may petition for a review of that wage rate by an administrative law judge.

#### § 525.2 Purpose and scope.

The regulations in this part govern the issuance of all certificates authorizing the employment of workers with disabilities at special minimum wages pursuant to section 14(c) of FLSA.

#### § 525.3 Definitions.

(a) FLSA means the Fair Labor Standards Act of 1938, as amended.

(b) Secretary means the Secretary of Labor or the Secretary of Labor's authorized representative.

(c) Administrator means the Administrator of the Wage and Hour Division, U.S. Department of Labor, or the Administrator's authorized representative.

(d) Worker with a disability for the purpose of this part means an individual whose earning or productive capacity is impaired by a physical or mental disability, including those relating to age or injury, for the work to be performed. Disabilities which may affect earning or productive capacity include blindness, mental illness, mental retardation, cerebral palsy, alcoholism, and drug addiction. The following, taken by themselves, are not considered disabilities for the purposes of this part: Vocational, social, cultural, or educational disabilities; chronic unemployment; receipt of welfare benefits; nonattendance at school; juvenile delinquency; and, correctional parole or probation. Further, a disability which may affect earning or productive capacity for one type of work may not affect such capacity for another.

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(e) Patient worker means a worker with a disability, as defined above, employed by a hospital or institution providing residential care where such worker receives treatment or care without regard to whether such worker is a resident of the establishment.

(f) Hospital or institution, hereafter referred to as institution, is a public or private, nonprofit or for-profit facility primarily engaged in (i.e., more than 50 percent of the income is attributable to) providing residential care for the sick, the aged, or the mentally ill or retarded, including but not limited to nursing homes,

intermediate care facilities, rest homes, convalescent homes, homes for the elderly and in-firm, halfway houses, residential centers for drug addicts or alcoholics, and the like, whether licensed or not licensed.

(g) Employ is defined in FLSA as to suffer or permit to work. An employment relationship arises whenever an individual, including an individual with a disability, is suffered or permitted to work. The determination of an employment relationship does not depend upon the level of performance or whether the work is of some therapeutic benefit. However, an individual does not become an employee if engaged in such activities as making craft products where the individual voluntarily participates in such activities and the products become the property of the individual making them, or all of the funds resulting from the sale of the products are divided among the participants in the activity or are used in purchasing additional materials to make craft products.

(h) Special minimum wage is a wage authorized under a certificate issued to an employer under this part that is less than the statutory minimum wage.

(i) Commensurate wage is a special minimum wage paid to a worker with a disability which is based on the worker's individual productivity in proportion to the wage and productivity of experienced nondisabled workers performing essentially the same type, quality, and quantity of work in the vicinity in which the individual under certificate is employed. For example, the commensurate wage of a worker with a disability who is 75% as productive as the average experienced non-disabled worker, taking into consideration the type, quality, and quantity of work of the disabled worker, would be set at 75% of the wage paid to the non-disabled worker. For purposes of these regulations, a commensurate wage is always a special minimum wage, i.e., a wage below the statutory minimum.

(j) Vicinity or locality means the geographic area from which the labor force of the community is drawn.

(k) Experienced worker means a worker who has learned the basic elements or requirements of the work to be performed, ordinarily by completion of a probationary or training period. Typically, such a worker will have received at least one pay raise after successful completion of the probationary or training period.

#### § 525.4 Patient workers.

With respect to patient workers, as defined in § 525.3(e), a major factor in determining if an employment relationship exists is whether the work performed is of any consequential economic benefit to the institution. Generally, work shall be considered to be of consequential economic benefit if it is of the type that workers without disabilities normally perform, in whole or in part in the institution or elsewhere. However, a patient does not become an employee if he or she merely performs personal housekeeping chores, such as maintaining his or her own quarters, or receives a token remuneration in connection with such services. It may also be possible for patients in family-like settings such as group homes to rotate or share household tasks or chores without becoming employees.

#### § 525.5 Wage payments.

(a) An individual whose earning or productive capacity is not impaired for the work being performed cannot be employed under a certificate issued pursuant to this part and must be paid at least the applicable minimum wage. An individual whose earning or productive capacity is impaired to the extent that the individual is unable to earn at least the applicable minimum wage may be paid a commensurate wage, but only after the employer has obtained a

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certificate authorizing payment of special minimum wages from the appropriate office of the Wage and Hour Division of the Department of Labor.

(b) With respect to patient workers employed in institutions, no deductions can be made from such individuals' commensurate wages to cover the cost of room, board, or other services provided by the facility. Such an individual must receive his or her wages free and clear, except for amounts deducted for taxes assessed against the employee and any voluntary wage assignments directed by the employee. (See part 531 of this title.) However, it is not the intention of these regulations to preclude the institution there-after from assessing or collecting charges for room, board, and other services actually provided to an individual to the extent permitted by applicable Federal or State law and on the same basis as it assesses and collects from nonworking patients.

#### § 525.6 Compensable time.

Individuals employed subject to this part must be compensated for all hours worked. Compensable time includes not only those hours during which the individual is actually performing productive work but also includes those hours when no work is performed but the individual is required by the employer to remain available for the next assignment. However, where the individual is completely relieved from duty and is not required to remain available for the next assignment, such time will not be considered compensable time. For example, an individual employed by a rehabilitation facility would not be engaged in a compensable activity where such individual is completely relieved from duty but is provided therapy or the opportunity to participate in an alternative program or activity in the facility not involving work and not directly related to the worker's job (e.g., self-help skills training, recreation, job seeking skills training, independent living skills, or adult basic education). The burden of establishing that such hours are not compensable rests with the facility and such hours must be clearly distinguishable from compensable hours. (For further information on compensable time in general under FLSA, see part 785 of this title.)

#### § 525.7 Application for certificates.

(a) Application for a certificate may be filed by any employer with the Regional Office of the Wage and Hour Division having administrative jurisdiction over the geographic area in which the employment is to take place.

(b) The employer shall provide answers to all of the applicable questions contained on the application form provided by the Regional Office.

(c) The application shall be signed by the employer or the employer's authorized representative.

#### § 525.8 Special provisions for temporary authority.

- (a) Temporary authority may be granted to an employer permitting the employment of workers with disabilities pursuant to a vocational rehabilitation program of the Veterans Administration for veterans with a service-incurred disability or a vocational rehabilitation program administered by a State agency.
- (b) Temporary authority is effective for 90 days from the date the appropriate section of the application form is signed and completed by the duly designated representative of the State agency or the Veterans Administration. Such authority may not be renewed or extended by the issuing agency.
- (c) The signed application constitutes the temporary authority to employ workers with disabilities at special minimum wage rates. A copy of the application must be forwarded within 10 days to the appropriate Regional Office of the Wage and Hour Division. Upon receipt, the application will be reviewed and, where appropriate, a certificate will be issued by the Regional Office. Where additional information is required or certification is denied, the applicant will receive notification from the Regional Office.

§ 525.9 Criteria for employment of workers with disabilities under certificates at special minimum wage rates.

- (a) In order to determine that special minimum wage rates are necessary in

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order to prevent the curtailment of opportunities for employment, the following criteria will be considered:

- (1) The nature and extent of the disabilities of the individuals employed as these disabilities relate to the individuals' productivity;
- (2) The prevailing wages of experienced employees not disabled for the job who are employed in the vicinity in industry engaged in work comparable to that performed at the special minimum wage rate;
- (3) The productivity of the workers with disabilities compared to the norm established for nondisabled workers through the use of a verifiable work measurement method (see § 525.12(h)) or the productivity of experienced non-disabled workers employed in the vicinity on comparable work; and,
- (4) The wage rates to be paid to the workers with disabilities for work comparable to that performed by experienced nondisabled workers.

(b) In order to be granted a certificate authorizing the employment of workers with disabilities at special minimum wage rates, the employer must provide the following written assurances concerning such employment:

- (1) In the case of individuals paid hourly rates, the special minimum wage rates will be reviewed by the employer at periodic intervals at a minimum of once every six months; and,
- (2) Wages for all employees will be adjusted by the employer at periodic intervals at a minimum of once each year to reflect changes in the prevailing wages paid to experienced non-disabled individuals employed in the locality for essentially the same type of work.

§ 525.10 Prevailing wage rates.

- (a) A prevailing wage rate is a wage rate that is paid to an experienced worker not disabled for the work to be performed. The Department recognizes that there

may be more than one wage rate for a specific type of work in a given area. An employer must be able to demonstrate that the rate being used as prevailing for determining a commensurate wage was objectively determined according to the guidelines contained in this section.

(b) An employer whose work force primarily consists of nondisabled workers or who employs more than a token number of nondisabled workers doing similar work may use as the prevailing wage the wage rate paid to that employer's experienced nondisabled employees performing similar work. Where an agency places a worker or workers with disabilities on the premises of an employer described above, the wage paid to the employer's experienced workers may be used as prevailing.

(c) An employer whose work force primarily consists of workers disabled for the work to be performed may determine the prevailing wage by ascertaining the wage rates paid to the experienced nondisabled workers of other employers in the vicinity. Such data may be obtained by surveying comparable firms in the area that employ primarily nondisabled workers doing similar work. The firms surveyed must be representative of comparable firms in terms of wages paid to experienced workers doing similar work. The appropriate size of such a sample will depend on the number of firms doing similar work but should include no less than three firms unless there are fewer firms doing such work in the area. A comparable firm is one which is of similar size in terms of employees or which competes for or bids on contracts of a similar size or nature. Employers may contact other sources such as the Bureau of Labor Statistics or private or State employment services where surveys are not practical. If similar work cannot be found in the area defined by the geographic labor market, the closest comparable community may be used.

(d) The prevailing wage rate must be based upon the wage rate paid to experienced nondisabled workers as defined elsewhere in these regulations. Employment services which only provide entry level wage data are not acceptable as sources for prevailing wage information as required in these regulations.

(e) There is no prescribed method for tabulating the results of a prevailing wage survey. For example, either a weighted or unweighted average would

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be acceptable provided the employer is consistent in the methodology used.

(f) The prevailing wage must be based upon work utilizing similar methods and equipment. Where the employer is unable to obtain the prevailing wage for a specific job to be performed on the premises, such as collating documents, it would be acceptable to use as the prevailing wage the wage paid to experienced individuals employed in similar jobs such as file clerk or general office clerk, requiring the same general skill levels.

(g) The following information should be recorded in documenting the determination of prevailing wage rates:

- (1) Date of contact with firm or other source;
- (2) Name, address, and phone number of firm or other source contacted;
- (3) Individual contacted within firm or source;

- (4) Title of individual contacted;
- (5) Wage rate information provided;
- (6) Brief description of work for which wage information is provided;
- (7) Basis for the conclusion that wage rate is not based upon an entry level position. (See also § 525.10(c).)
- (h) A prevailing wage may not be less than the minimum wage specified in section 6(a) of FLSA.

§ 525.11 Issuance of certificates.

- (a) Upon consideration of the criteria cited in these regulations, a special certificate may be issued.
- (b) If a special minimum wage certificate is issued, a copy shall be sent to the employer. If denied, the employer will be notified in writing and told the reasons for the denial, as well as the right to petition under § 525.18.

§ 525.12 Terms and conditions of special minimum wage certificates.

- (a) A special minimum wage certificate shall specify the terms and conditions under which it is granted.
- (b) A special minimum wage certificate shall apply to all workers employed by the employer to which the special certificate is granted provided such workers are in fact disabled for the work they are to perform.
- (c) A special minimum wage certificate shall be effective for a period to be designated by the Administrator.

Workers with disabilities may be paid wages lower than the statutory minimum wage rate set forth in section 6 of FLSA only during the effective period of the certificate.

- (d) Workers paid under special minimum wage certificates shall be paid wages commensurate with those paid experienced nondisabled workers employed in the vicinity in which they are employed for essentially the same type, quality, and quantity of work.
- (e) Workers with disabilities shall be paid not less than one and one-half times their regular rates of pay for all hours worked in excess of the maximum workweek applicable under section 7 of FLSA.
- (f) The wages of all workers paid a special minimum wage under this part shall be adjusted by the employer at periodic intervals at a minimum of once a year to reflect changes in the prevailing wages paid to experienced individuals not disabled for the work to be performed employed in the vicinity for essentially the same type of work.
- (g) Each worker with a disability and, where appropriate, a parent or guardian of the worker, shall be in-formed, orally and in writing, of the terms of the certificate under which such worker is employed. This requirement may be satisfied by making copies of the certificate available. Where a worker with disabilities displays an understanding of the terms of a certificate and requests that other parties not be informed, it is not necessary to inform a parent or guardian.
- (h) In establishing piece rates for workers with disabilities, the following criteria shall be used:

- (1) Industrial work measurement methods such as stop watch time studies, predetermined time systems, standard data, or other measurement methods

(hereinafter referred to as “work measurement methods”) shall be used by the employer to establish standard production rates of workers not disabled for the work to be performed. The Department will accept the use of whatever method an employer chooses to use. However, the employer has the responsibility of demonstrating that a particular method is generally accepted by industrial

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engineers and has been properly executed. No specific training or certification will be required. Where work measurement methods have already been applied by another employer or source, and documentation exists to show that the methods used are the same, it is not necessary to repeat these methods to establish production standards.

(i) The piece rates shall be based on the standard production rates (number of units an experienced worker not disabled for the work is expected to produce per hour) and the prevailing industry wage rate paid experienced nondisabled workers in the vicinity for essentially the same type and quality of work or for work requiring similar skill. (Prevailing industry wage rate divided by the standard number of units per hour equals the piece rate.).

(ii) Piece rates shall not be less than the prevailing piece rates paid experienced workers not disabled for the work doing the same or similar work in the vicinity when such piece rates exist and can be compared with the actual employment situations of the workers with disabilities.

(2) Any work measurement method used to establish piece rates shall be verifiable through the use of established industrial work measurement techniques.

(i) If stop watch time studies are made, they shall be made with a person or persons whose productivity represents normal or near normal performance. If their productivity does not represent normal or near normal performance, adjustments of performance shall be made. Such adjustments, sometimes called “performance rating” or “leveling” shall be made only by a person knowledgeable in this technique, as evidenced by successful completion of training in this area. The persons observed should be given time to practice the work to be performed in order to provide them with an opportunity to overcome the initial learning curve. The persons observed shall be trained to use the specific work method and tools which are available to workers with disabilities employed under special minimum wage certificates.

(ii) Appropriate time shall be allowed for personal time, fatigue, and unavoidable delays. Generally, not less than 15% allowances (9–10 minutes per hour) shall be used in conducting time studies.

(iii) Work measurements shall be conducted using the same work method that will be utilized by the workers with disabilities. When modifications such as jigs or fixtures are made to production methods to accommodate special needs of individual workers with disabilities, additional work measurements need not be conducted where the modifications enable the workers with disabilities to perform the work or increase productivity but would impede a worker without disabilities. Where workers with disabilities do not have a method available to them, as for

example where an adequate number of machines are not available, a second work measurement should be conducted.

(i) Each worker with a disability employed on a piece rate basis should be paid full earnings. Employers may “pool” earnings only where piece rates cannot be established for each individual worker. An example of this situation is a team production operation where each worker’s individual contribution to the finished product can-not be determined separately. However, in such situations, the employer should make every effort to objectively divide the earnings according to the productivity level of each individual worker.

(j) The following terms shall be met for workers with disabilities employed at hourly rates:

(1) Hourly rates shall be based upon the prevailing hourly wage rates paid to experienced workers not disabled for the job doing essentially the same type of work and using similar methods or equipment in the vicinity. (See also §525.10.)

(2) An initial evaluation of a worker’s productivity shall be made within the first month after employment begins in order to determine the worker’s commensurate wage rate. The results of the evaluation shall be recorded and the worker’s wages shall be adjusted accordingly no later than the first complete pay period following the initial evaluation. Each worker is entitled

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to commensurate wages for all hours worked. Where the wages paid to the worker during pay periods prior to the initial evaluation were less than the commensurate wage indicated by the evaluation, the employer must compensate the worker for any such difference unless it can be demonstrated that the initial payments reflected the commensurate wage due at that time.

(3) Upon completion of not more than six months of employment, a review shall be made with respect to the quantity and quality of work of each hourly-rated worker with a disability as compared to that of nondisabled workers engaged in similar work or work requiring similar skills and the findings shall be recorded. The worker’s productivity shall then be reviewed and the findings recorded at least every 6 months thereafter. A review and re-cording of productivity shall also be made after a worker changes jobs and at least every 6 months thereafter. The worker’s wages shall be adjusted accordingly no later than the first complete pay period following each review. Conducting reviews at six-month intervals should be viewed as a minimum requirement since workers with disabilities are entitled to commensurate wages for all hours worked. Reviews must be conducted in a manner and frequency to insure payment of commensurate wages. For example, evaluations should not be conducted before a worker has had an opportunity to become familiar with the job or at a time when the worker is fatigued or subject to conditions that result in less than normal productivity.

(4) Each review should contain, as a minimum and in addition to the data cited above, the following: name of the individual being reviewed; date and time of the review; and, name and position of the individual doing the review.

§ 525.13 Renewal of special minimum wage certificates.

(a) Applications may be filed for renewal of special minimum wage certificates.

(b) If an application for renewal has been properly and timely filed, an existing special minimum wage certificate shall remain in effect until the application for renewal has been granted or denied.

(c) Workers with disabilities may not continue to be paid special minimum wages after notice that an application for renewal has been denied.

(d) Except in cases of willfulness or those in which the public interest requires otherwise, before an application for renewal is denied facts or conduct which may warrant such action shall be called to the attention of the employer in writing and such employer shall be afforded an opportunity to demonstrate or achieve compliance with all legal requirements.

#### § 525.14 Posting of notices.

Every employer having workers who are employed under special minimum wage certificates shall at all times display and make available to employees a poster as prescribed and supplied by the Administrator. The Administrator will make available, upon request, posters in other formats such as Braille or recorded tapes. Such a poster will explain, in general terms, the conditions under which special minimum wages may be paid and shall be posted in a conspicuous place on the employer's premises where it may be readily observed by the workers with disabilities, the parents and guardians of such workers, and other workers. Where an employer finds it inappropriate to post such a notice, this requirement may be satisfied by providing the poster directly to all employees subject to its terms.

#### § 525.15 Industrial homework.

(a) Where the employer is an organization or institution carrying out a recognized program of rehabilitation for workers with disabilities and holds a special certificate issued pursuant to this part, certification under regulations governing the employment of industrial homeworkers (29 CFR part 530) is not required.

(b) For all other types of employers, special rules apply to the employment of homeworkers in the following industries: Jewelry manufacturing, knitted outerwear, gloves and mittens, buttons and buckles, handkerchief manufacturing, embroideries, and women's apparel. (See 29 CFR part 530.)

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#### § 525.16 Records to be kept by employers.

Every employer, or where appropriate (in the case of records verifying the workers' disabilities) the referring agency or facility, of workers employed under special minimum wage certificates shall maintain and have available for inspection records indicating:

(a) Verification of the workers' disabilities;

(b) Evidence of the productivity of each worker with a disability gathered on a continuing basis or at periodic intervals (not to exceed six months in the case of employees paid hourly wage rates);

(c) The prevailing wages paid workers not disabled for the job performed who are employed in industry in the vicinity for essentially the same type of work using similar methods and equipment as that used by each worker with disabilities

employed under a special minimum wage certificate (see also § 525.10(b) and (d));

(d) The production standards and supporting documentation for non-disabled workers for each job being performed by workers with disabilities employed under special certificates; and

(e) The records required under all of the applicable provisions of part 516 of this title, except that any provision pertaining to homemaker handbooks shall not be applicable to workers with disabilities who are employed by a recognized nonprofit rehabilitation facility and working in or about a home, apartment, tenement, or room in a residential establishment. (See § 525.15) Records required by this section shall be maintained and preserved for the periods specified in part 516 of this title.

(Approved by the Office of Management and Budget under control number 1215-0017)

#### § 525.17 Revocation of certificates.

(a) A special minimum wage certificate may be revoked for cause at any time. A certificate may be revoked:

(1) As of the date of issuance, if it is found that misrepresentations or false statements have been made in obtaining the certificate or in permitting a worker with a disability to be employed thereunder;

(2) As of the date of violation, if it is found that any of the provisions of FLSA or of the terms of the certificate have been violated; or

(3) As of the date of notice of revocation, if it is found that the certificate is no longer necessary in order to pre-vent curtailment of opportunities for employment, or that the requirements of these regulations other than those referred to in paragraph (a)(2) of this section have not been complied with.

(b) Except in cases of willfulness or those in which the public interest requires otherwise, before any certificate shall be revoked, facts or conduct which may warrant such action shall be called to the attention of the employer in writing and such employer shall be afforded an opportunity to demonstrate or achieve compliance with all legal requirements.

#### § 525.18 Review.

Any person aggrieved by any action of the Administrator taken pursuant to this part may, within 60 days or such additional time as the Administrator may allow, file with the Administrator a petition for review. Such review, if granted, shall be made by the Administrator. Other interested persons, to the extent it is deemed appropriate, may be afforded an opportunity to present data and views.

#### § 525.19 Investigations and hearings.

The Administrator may conduct an investigation, which may include a hearing, prior to taking any action pursuant to these regulations. To the extent it is deemed appropriate, the Administrator may provide an opportunity to other interested persons to present data and views. Proceedings initiated pursuant to this section are separate from those taken pursuant to FLSA section 14(c)(5) and § 525.22.

#### § 525.20 Relation to other laws.

No provision of these regulations, or of any special minimum wage certificate issued thereunder, shall excuse noncompliance with any other Federal or State law or municipal ordinance establishing higher standards.

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##### § 525.21 Lowering of wage rates.

(a) No employer may reduce the minimum hourly wage rate, guaranteed by a special minimum wage certificate in effect on June 1, 1986, of any worker with disabilities from June 1, 1986 until May 31, 1988, without prior authorization of the Secretary.

(b) This provision applies to those workers with disabilities who were:

(1) Employed during the pay period which included June 1, 1986, even if no work was performed during that pay period; and

(2) Employed under a group or individual special minimum wage certificate which specified a minimum guaranteed rate, i.e., a special certificate issued under former section 14(c) (1) or (2)(b) of FLSA.

(c) In order to obtain authority to lower the wage rate of a worker with a disability to whom this provision applies to a rate below the certificate rate, the employer must submit information as prescribed under this section to the appropriate Regional Office. The burden of establishing the necessity of lowering the wage of a worker with a disability rests with the employer.

(d) In reviewing a request to lower a wage rate of a worker with a disability, documented evidence of the following will be considered:

(1) Any change in the worker's disabling condition which has a substantially negative impact on productive capacity;

(2) Any change in the type of work being performed in the facility which would affect the productivity of the worker with a disability or which would result in the application of a lower prevailing wage rate;

(3) Any change in general economic conditions in the locality in which the work is performed which results in lower prevailing wage rates.

(e) A wage rate may not be lowered until authorization is obtained.

##### § 525.22 Employee's right to petition.

(a) Any employee receiving a special minimum wage at a rate specified pursuant to subsection 14(c) of FLSA or the parent or guardian of such an employee may petition the Secretary to obtain a review of such special minimum wage rate. No particular form of petition is required, except that a petition must be signed by the individual, or the parent or guardian of the individual, and should contain the name and address of the employee and the name and address of the employee's employer. A petition may be filed in person or by mail with the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S3502, 200 Constitution Avenue NW., Washington, DC 20210. The petitioner may be represented by counsel in any stage of such proceedings. Upon receipt, the petition shall be forwarded immediately to the Chief Administrative Law Judge.

(b) Upon receipt of a petition, the Chief Administrative Law Judge shall, within 10 days of the receipt of the petition by the Secretary, appoint an Administrative Law

Judge (ALJ) to hear the case. Upon receipt, the ALJ shall notify the employer named in the petition. The ALJ shall also notify the employee, the employer, the Administrator, and the Associate Solicitor for Fair Labor Standards of the time and place of the hearing. The date of the hearing shall be not more than 30 days after the assignment of the case to the ALJ. All the parties shall be given at least eight days' notice of such hearing. Because of the time constraints imposed by the statute, requests for postponement shall be granted only sparingly and for compelling reasons.

(c) Hearings held under this subpart shall be conducted, consistent with statutory time limitations, under the Department's rules of practice and procedure for administrative hearings found in 29 CFR part 18. There shall be a minimum of formality in the proceeding consistent with orderly procedure. Any employer who intends to participate in the proceeding shall provide to the ALJ, and shall serve on the petitioner and the Associate Solicitor for Fair Labor Standards no later than 15 days prior to the commencement of the hearing, or as soon as practical depending on when the notice of a hearing as required under paragraph (b) of this section was received, that documentary evidence pertaining to the employee or employees identified in the petition which is contained in the

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records required by § 525.16 (a), (b), (c) and (d). The Administrator shall be permitted to participate by counsel in the proceeding upon application.

(d) In determining whether any special minimum wage rate is justified, the ALJ shall consider, to the extent evidence is available, the productivity of the employee or employees identified in the petition and the conditions under which such productivity was measured, and the productivity of other employees performing work of essentially the same type and quality for other employers in the same vicinity and the conditions under which such productivity was measured. In these proceedings, the burden of proof on all matters relating to the propriety of a wage at issue shall rest with the employer.

(e) The ALJ shall issue a decision within 30 days after the termination of the hearing and shall serve the decision on the Administrator and all interested parties by Express Mail or other similar system guaranteeing one-day delivery. The decision shall contain appropriate findings and conclusions and an order. If the ALJ finds that the special minimum wage being paid or which has been paid is not justified, the order shall specify the lawful rate and the period of employment to which the rate is applicable. In the absence of evidence sufficient to support the conclusion that the proper wage should be less than the minimum wage, the ALJ shall order that the minimum wage be paid.

(f) Within 15 days after the date of the decision of the ALJ, the petitioner, the Administrator, or the employer who seeks review thereof may request review by the Secretary. No particular form of request is required, except that a request must be in writing and must attach a copy of the ALJ's decision. Requests for review shall be filed with the Secretary of Labor, 200 Constitution Ave. NW., Washington, DC 20210. Any other interested party may file a reply thereto with the Secretary and the Administrator within 5 working days of receipt of such request for re-view. The request for review and reply thereto shall be transmitted by the Administrator to all interested parties by Express Mail or other similar system guaranteeing one-day delivery.

(g) The decision of the ALJ shall be deemed to be final agency action 30 days after issuance thereof, unless within 30 days of the date of the decision the Secretary grants a request to review the decision. Where such re-quest for review is granted, within 30 days after receipt of such request the Secretary shall review the record and shall either adopt the decision of the ALJ or issue exceptions. The decision of the ALJ, together with any exceptions issued by the Secretary, shall be deemed to be a final agency action.

(h) Within 30 days of issuance of the final action of the Secretary reviewing the decision of the ALJ or declining to grant such review, any person adversely affected or aggrieved by such action may seek judicial review pursuant to chapter 7 of title 5, United States Code. The record of the case, including the record of proceedings be-fore the ALJ, shall be transmitted by the Secretary to the appropriate court pursuant to the rules of such court.

§ 525.23 Work activities centers.

Nothing in these regulations shall be interpreted to prevent an employer from maintaining or establishing work activities centers to provide therapeutic activities for workers with disabilities as long as the employer complies with the requirement of these regulations. Work activities centers shall include centers planned and designed to provide therapeutic activities for workers with severe disabilities affecting their productive capacity. Any establishment whose workers with disabilities are employed at special minimum wages must comply with the requirements of this part, regardless of the designation of such establishment.

§ 525.24 Advisory Committee on Special Minimum Wages.

The Advisory Committee on Special Minimum Wages, the members of which are appointed by the Secretary, shall advise and make recommendations to the Administrator concerning the administration and enforcement of these regulations and the need for amendments thereof and shall serve such other functions as may be desired by the Administrator.