

Section 14(c) of the Fair Labor Standards Act



THE PAYMENT OF SUBMINIMUM WAGES TO WORKERS WITH DISABILITIES

WAGE AND HOUR DIVISION
U.S. DEPARTMENT OF LABOR

The Wage and Hour Division (WHD)



It is the responsibility of WHD to carry out a vigorous, consistent, and effective compliance program with respect to employment of workers with disabilities under this provision

Disclaimer



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Topics of Discussion



- Section 14(c) Provisions
- Establishing Coverage
- The Employment Relationship
 - Types of Employment
- Determining Hours Worked
- The Process to Determine SMW
- The Certification Process
- Record & Notice Requirements
- Common Errors

Section 14(c) Provisions



- Statute
- Key Terms
- Regulations

Section 14(c) of the FLSA



Authorizes the employment of workers with disabilities at subminimum wages when their disabilities impair their productivity
for the work being performed

Subminimum Wage (SMW)



- A SMW can be paid to workers with disabilities when their disability impairs their productive and earning capacities for the work being performed
- SMW must be *commensurate* with the workers' productivity as compared to the wage and productivity of experienced workers who are not disabled for the work
- SMW can only be paid when authorized by a certificate issued to the employer by DOL

Worker With a Disability



- Worker whose earning or productive capacity is impaired (*by age, physical, intellectual/developmental, or psychiatric disability, or by injury*) for the work to be performed
- Although a disability may effect a worker's earning or productive capacity for one type of work, the same disability may have no impact on that worker's ability to perform another kind of work
- Employers remain responsible for compliance with all other labor laws, including the ADA and the Rehabilitation Act

Community Rehabilitation Program (CRP)



Provides rehabilitation services, day treatment, training, and/or employment opportunities to individuals with disabilities

CRPs commonly refer to workers with disabilities who are employed pursuant to a section 14(c) certificate as “consumers”

Regulations 29 CFR Part 525



Set forth the conditions and terms governing
the employment of workers with disabilities
at subminimum wages

Key FLSA Concepts



- Coverage
- Employment Relationship
- Hours Worked

FLSA Enterprise Coverage



- A firm with at least a \$500,000 annual dollar volume (ADV) of sales or business done that has at least two employees handling, selling or otherwise working on goods or materials moved in or provided for commerce
- O R**
- A for-profit or nonprofit firm engaged in the operation of a:
 - hospital;
 - nursing home/group home;
 - school for children with physical, intellectual/developmental, or psychiatric disabilities;
 - public or private elementary or secondary school or institution of higher education; or
 - preschool
 - A Federal, State, or local government agency

FLSA Individual Coverage



An individual employee if he or she is engaged in:

- ✦ Interstate commerce

OR

- ✦ The production of goods for interstate commerce

OR

- ✦ Work that is closely related and directly essential (CRADE) to such production

But only for the workweek in which those covered activities occur

An Employee Under the FLSA



- FLSA Definitions
 - Employee = “any individual employed by an employer”
 - Employ = “to suffer or permit to work”
- Time spent by an individual at a CRP receiving services does not have to be paid under the FLSA

Patient Worker



- An individual with a disability who receives treatment at a hospital or residential care facility and is employed by that same hospital or residential care facility
 - Treatment may be received on an inpatient or outpatient basis
- Whether an employment relationship exists depends in part on whether the work performed is of any consequential economic benefit to the institution
- A patient undergoing evaluation or training is not considered to be an employee during the first three months spent in work activities, if certain criteria are met

Participants in Substance Abuse Programs



- An individual enrolled in a substance abuse recovery program may be classified as a patient worker if employed by the facility providing the treatment
- An employment relationship under the FLSA will not exist for the first four weeks (28 consecutive calendar days) of *residence* at the facility so long as the individual does not engage in activities that provide a consequential economic benefit to the facility
- Special provisions apply to participants in programs that are placed in “family setting” style residential care facilities

Volunteers



Workers with disabilities may volunteer to perform certain tasks for the not-for-profit CRP without creating an employment relationship if:

- The worker is legally competent to freely volunteer (or, when appropriate, his or her parent or guardian approves)
- The task performed is substantially different from work that the individual performs during duty hours
- The task is performed outside normal duty hours
- The task is of the type that would normally be classified as “volunteer” work
- The task is not part of the business or commercial activities of a non-profit organization

Hours Worked



- The FLSA concept of hours worked - determining when an employee is performing work for which he or she must be compensated - applies to workers with disabilities who receive subminimum wages
- All time spent at a CRP by an individual may not be compensable (such as the time he or she spends in counseling, personal care, recreation, etc.)

Down Time



- Workers with disabilities are required to be paid for down time when the worker with a disability is on the job but is not producing because of factors not within his or her control, including:
 - lack of work
 - equipment breakdowns

Extended Down Time



- Rehabilitation services provided to individuals during periods of extended down time, need **NOT** be considered compensable when:
 - The services provided are not primarily for the purpose of increasing job productivity
 - The services are provided away from the production area
 - Time is clearly identified, recorded, and segregated on time records

Work Samples and Work Simulations



Work samples and work simulations are types of rehabilitation activities structured to resemble the work performed in the employer's facility and need **not** be considered compensable when:

- Performed away from the production area
- Completed product is not used to fulfill any of the employer's contracts
- The employer does not derive any economic benefit from the product
- Supervised by non-production personnel
- They are a specific part of a well-defined program of rehabilitation
- None of the products enter into commerce by being intermingled with the normal production of the employer

Travel Time



- Time spent to and from the work site and home at the beginning and end of the day is not considered hours worked
 - This principle applies even when the transportation is provided by the employer for the benefit of workers with disabilities
- Time spent in transportation between job sites during the course of the workday is considered hours worked and the employee must be compensated for that time

Rest Periods and Breaks



- The FLSA does not require rest periods or breaks
- Breaks between 5 and 20 minutes are considered to be primarily for the benefit of the employer and are considered hours worked and are compensable
 - Workers with disabilities who are paid on an hourly basis must be compensated for such breaks
 - Worker with disabilities who are paid piece rates are NOT required to be compensated for such breaks, when the piece rate calculation includes a sufficient allowance for personal time, fatigue, and unavoidable delays (PF & D)

Recording Hours Worked



- The FLSA requires employers to keep records of both the daily and weekly hours worked
 - 29 CFR Part 516
- The employer must clearly distinguish in its records non-compensable hours from hours that would be considered hours worked

The Certification Process



14(c) Certification



- Only employers who have applied for and received a certificate from the Wage and Hour Division may choose to pay SMWs to workers who are disabled for the work being performed
- The granting of a certificate is **NOT** a statement of compliance by the Wage and Hour Division
- Certificates will **NOT** be issued retroactively

Types of Establishments



WHD issues 14(c) Certificates to:

- Community Rehabilitation Programs (CRPs)
 - ✦ 2 year certificates
- Establishments that employ patient workers
 - ✦ 2 year certificates
- Business establishments
 - ✦ 1 year certificates
- School Work Experience Programs (SWEPs)
 - ✦ 1 year certificates

Community Rehabilitation Programs



- CRPs must obtain a certificate from WHD to pay SMWs to workers with disabilities
- A certificate will be issued for the main establishment and each branch establishment

Establishments that Employ Patient Workers



- Hospitals/residential care facilities must obtain a certificate from WHD to pay SMWs to patient workers
- If the facility operates a work center, it must apply for a separate certificate for the work center
- If the facility places patients in jobs at business establishments in the community, it must either obtain a work center certificate or ensure that the business establishments have their own certificate

Business Establishments



- Must obtain a certificate from WHD to pay SMWs to workers with disabilities
- If an individual with a disability is placed at a business by a CRP, is supervised by CRP staff, and is carried on the CRP's payroll (e.g., supported employment worksites, enclaves) the business establishment need not obtain a certificate
 - The authorization to pay SMWs will stem from the certificate held by the CRP

School Work Experience Programs (SWEPP)



- Must obtain a certificate from WHD to pay SMWs to students with disabilities
- Certificates are issued to the schools administering the SWEPP, not the businesses at which the students are placed

How to Apply for a Certificate



- Employers wishing to obtain a certificate must complete the appropriate WHD forms
 - WH-226: application
 - WH-226A: supplemental sheet for each physically-separate location or worksite where workers with disabilities will be employed at subminimum wages
 - Instructions for completing the forms are on the last page of each form
- Completed applications should be mailed to:
 - U.S. Department of Labor, Wage and Hour Division
230 South Dearborn Street, Room 514
Chicago, Illinois 60604-1591

WH-226



Application for Authority to Employ Workers with Disabilities at Special Minimum Wages

U.S. Department of Labor
Wage and Hour Division
230 South Dearborn Street, Room 514
Chicago, Illinois 60604



OMB No.: 1235-0001
Expires: 05-31-2017

This is an application for the authority to employ workers with disabilities at special minimum wage rates under the Fair Labor Standards Act (FLSA), Walsh-Healey Public Contracts Act (PCA), or McNamara-O'Hara Service Contract Act (SCA). An instruction sheet for completing this form is contained on page 4. Please submit one copy of the completed form, and any attachments, to the address shown above. Retain a completed copy for your records. A certificate may not be granted by the Department of Labor unless a properly completed application has been received and approved. 29 U.S.C. § 201, et seq.

1. a. This is a request for authority to employ workers with disabilities for (Check All Boxes that Apply):

- Community Rehabilitation Center (Work Center)
- Hospital/Residential Care Facility (Patient Workers)
- Business Establishment (Special Workers)
- School Work Experience Program (SWEP)

b. This is (Check One):

- Initial Application (Complete All Items)
- Renewal Application (Please Make Any Necessary Corrections to Reprinted Information)

Current Certificate Number: _____

2. Name of Employer

Street Address _____

Mailing Address (If Different than Street Address) _____

City _____ County _____

State _____ Zip Code _____

Federal Employer Identification Number (EIN) _____

Person USDOL should contact _____

Telephone (_____) _____

3. Parent Organization if different from that listed in #2:

Name _____

Address _____

Check here if mail is to be sent to parent organization rather than #2.

4. Status (Check One):

- Public (State or Local Government) Private, For Profit
- Private, Not For Profit Other _____

5. Primary Disability Group Employed (Check One):

- Mental Retardation (MR)
- Alcoholism (AL)
- Mental Illness (MI)
- Drug Addictions (DA)
- Visual Impairment (VI)
- Neuromuscular (NM)
- Hearing Impairment (HI)
- Developmental Disability (DD) Specify: _____
- General — No Primary Group (GI)
- Age Related (AR)
- Other (OT) Specify: _____

For USDOL Use Only

Certificate Number _____

Effective Date ____/____/____ Expiration Date ____/____/____

RO _____ DO _____

Remarks _____

Employees _____ Paying SMW's Yes No

Number of sites to receive a certificate _____

Print Certificate Yes No WS _____

6. List the name and address(es) of all branch establishments (BR), supported employment sites, including enclaves (SE), or school work experience program sites (SWEP) to be covered by this certificate. Note: A separate Supplemental Data Sheet (WH-226A) must be completed for every establishment where you employ workers with disabilities at special minimum wages (including your main establishment and each establishment listed below). See page 4 of this application for definitions of BR, SE and SWEP. Attach additional sheets if necessary.

Indicate if BR, SE or SWEP	Name & Address of Site

7. Do you manufacture items for the Federal Government under PCA? Yes No

Do you perform any services for the Federal Government under SCA? Yes No

✓ Remember to attach copies of all current SCA Wage Determinations for those contracts upon which workers with disabilities are employed and earning special minimum wages.

...impaired by their disabilities and were paid special minimum wages for this date using the categories below.

Workers with disabilities are paid an hourly rate or a piece rate. The applicant must provide information regarding the method of payment, determination, and provide the information obtained from these workers.

Date of Contact	Prevailing Wage Provided by Source	Prevailing Wage Determined by Applicant
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____

...were paid special minimum wages and were paid hourly rates during _____

...a disability who is paid a special minimum wage? _____

...employed workers with disabilities who are paid hourly rates (if you do not use the three employees for whom data is submitted must identify the worker's individual productivity in proportion to the wage rate being essentially the same type, quality and quantity of work in _____)

...were paid special minimum wages and were paid piece rates during _____

...which workers with disabilities earning special minimum wages _____

Job (Hour)	Standard Productivity (Units/Hour)	Piece Rate Paid to Workers (Rate per Unit)

...such, receiving Social Security Benefits such as SSI or _____

6. THE MINIMUM WAGE OR SPECIAL MINIMUM WAGE
...instances, to count toward its minimum obligations. Check the box if you are crediting the cost of providing care or special minimum wage obligations to workers with _____

...m administered by a State agency or the U.S. Veterans Administration pursuant to a vocational rehabilitation program. Temporary authority will exist for 90 days of the signing. (See 29 C.F.R. § 525.8 and instructions _____)

...and information given in the application and attachments. The authority to pay workers with disabilities at special minimum wages is subject to revocation in accordance with the conditions, the following conditions exist and will continue _____

...to cover the cost of room, board or other services provided to workers with disabilities and productivity, time studies or work measurements, and _____

...reviews, at least once a year, to reflect changes in the wages in the vicinity for essentially the same type of work. _____

...it is a collection of information unless such collection displays the burden for this collection of information will average 45 minutes, gathering and maintaining the data needed, and this collection is mandatory in order to obtain the authority to certify regarding the burden estimate or any other aspect of the collection of information, contact the Office of Management and Budget, Paperwork Reduction Project (3045-0047), Washington, DC 20503. Reference the OMB Control Number. _____

...r Standards Act (FLSA), the Walsh-Healey Public Contracts Act, or McNamara-O'Hara Service Contract Act. A certificate may also request immediate temporary certificate _____

...bor, Employment Standards Administration, Wage and Hour Division (3045-0047) Keep a copy of the application for your records. If a worker with a disability who is employed by a hospital or school work experience program, for purposes of this application, that is seeking permission to employ workers with disabilities under the program by which students with disabilities may be placed _____

...work site (including enclaves), or school work experience site. For each site where workers with disabilities are employed, you will receive two separate certificates. Likewise, a separate program site for which you completed a WH-226A, including enclaves, however, are covered by the certificate _____

...site. A supported employment work site is a location, outside the work center or rehabilitation center, where workers with disabilities are employed by staff from the work center. An enclave is a supported employment program site for which you completed a WH-226A, including enclaves, however, are covered by the certificate _____

(SWEPS)
...on covering all of the students with disabilities and all of the compliance with all applicable child labor laws, minimum wage law, or school work experience program must be paid commensurate wage to workers who do not have disabilities performing essentially Complete all items except 12. _____

...students with disabilities are employed at special employment "Description of Work" blocks which are not used. _____

OR SCA OR VETERANS ADMINISTRATION AUTHORITY TO PAY SPECIAL MINIMUM WAGES
...are to be placed in a facility or State vocational rehabilitation agency or school work experience program. A disability is being placed at special minimum wages _____

WH-226A

Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Special Minimum Wages

U.S. Department of Labor
 Wage and Hour Division
 230 South Dearborn Street, Room 514
 Chicago, Illinois 60604



OMB No.: 1235-0001
 Expires: 05-31-2017

Complete this form for every establishment/work site where you employed workers with disabilities at special minimum wages during your most recently completed fiscal quarter and submit with the Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (WH-226). These establishments/work sites must also be listed on Item 6 of the WH-226. See the next page for instructions for completing this form.

1. Name of work site _____
2. Address of work site _____
3. This work site is (check one)
- ME Your Main Establishment
- BR Branch Establishment
- SE Supported Employment Site, Including Enclaves
- SWEP School Work Experience Program Site
4. Enter the ending date of the most recently completed fiscal quarter for which you are providing information in Items 5 through 9 below ____/____/____
5. Is SCA work performed at this establishment/work site? YES NO

Below, list all employees with disabilities paid special minimum wages during your most recently completed fiscal quarter. You may submit the following information in alternative formats, for example computer printouts, as long as all the requested information is included. You may attach additional sheets as necessary.

6. Name of Worker with a Disability	7. Primary Disability	8. Type of Work	9. Average Earnings per Hour

10. Enter the Total Number of unduplicated employees who are Employed at this work site and receive special minimum wages _____
- Public Burden Statement**

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The Department of Labor estimates that the public reporting burden for this collection of information will average 45 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The obligation to respond to this collection is mandatory in order to obtain the authority to pay less than the applicable minimum wage. 29 C.F.R. §§ 525.7-9, 12-13. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, DC 20210 and reference the OMB Control Number. **SEND THE COMPLETED SURVEY TO THE ADDRESS ON THE FRONT OF THE FORM.**

Form WH-226A
 Rev. December 2010

INSTRUCTIONS FOR COMPLETING FORM WH-226A

Complete this form for every establishment/work site where you employed workers with disabilities for the work performed at special minimum wages during your most recently completed fiscal quarter and submit with the Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (WH-226).

- Item 1.** Enter the name of the work site/establishment covered by this form. Remember that your main establishment is also considered a work site if workers with disabilities are employed there at special minimum wages. The work site/establishment covered by this form must also appear in either Item 2 or Item 6 of the WH-226.
- Item 2.** Enter the address of the work site covered by this form. This same address must appear in Item 2 or Item 6 of the WH-226. Remember that a separate WH-226A must be submitted for each work site/establishment.
- Item 3.** Indicate the type of work site covered by this data sheet.
- ME:** Your Main Establishment. The establishment named in Item 2 of the WH-226.
- BR:** Branch Establishment. A branch establishment is an establishment or facility operated by the enterprise, that is physically separate from the main establishment, where workers with disabilities are employed at special minimum wages.
- SE:** Supported Employment site, including Enclaves. A supported employment work site is a location, outside of the work center or rehabilitation center, often on the premises of an enterprise separate from the work center or rehabilitation center, where workers with disabilities paid special minimum wages are placed in employment settings along with work center staff (job coaches). An enclave is a supported employment work site where a group of workers with disabilities is working and supervised by staff from the work center.
- SWEP:** School Work Experience Program site. A school work experience program (SWEP) site is a workplace in the community in which a school system has placed a student(s) with disabilities to work in a job(s) at special minimum wages.
- Item 4.** Enter the date (month/day/year) your most recently completed fiscal quarter ended. This is the quarter for which you are providing information in Items 6 through 9.
- Item 5.** Indicate whether workers with disabilities perform work subject to the Service Contract Act (SCA) at this work site.
- Item 6.** Individually list by name all those workers whose disabilities impaired their productive capacity for the work performed during your most recently completed fiscal quarter and who earned less than the statutory minimum wage or SCA wage determination rate.
- Item 7.** Identify the primary disability of each worker identified in Item 6. You may use the codes provided in Item 5 of the WH-226 or mention the disability by name — for example you could list NM (neuromuscular) or cerebral palsy.
- Item 8.** Clearly identify the primary type of work performed by each worker with a disability. Possible examples include truck helper, assembler, janitor, or machine operator.
- Item 9.** For workers paid hourly wage rates, list the rate or rates paid at the end of the fiscal quarter.
- For workers paid by piece rates, list the average earnings per hour. Average earnings are computed by dividing the total earnings of the individual worker by the number of hours worked during that fiscal quarter. For example: John Jones earned \$900.00 during the quarter ending 6/30/01. He worked 300 hours that quarter, so his average earnings per hour are \$3.00. \$3.00 should then be entered in Item 9.
- The following is an example of how to complete Items 6, 7, 8 and 9:

6. Name of Worker with a Disability	7. Primary Disability	8. Type of Work	9. Average Earnings per Hour
John Jones	NM	Assembles Bags of Bolts	\$3.00
Robert Smith	Neuromuscular	Material Handler	\$3.50
Mary Evans	Mental Retardation	Janitor	\$4.15

- Item 10.** Enter the total number of employees employed at this work site who are paid special minimum wages. Count each employee only once. Remember, each of these employees must be reported in Items 6 through 9.

The completed WH-226 and all accompanying form(s) WH-226A should be mailed to U.S. Department of Labor, Wage and Hour Division, Employment Standards Administration, 230 South Dearborn Street, Room 514, Chicago, Illinois 60604.

Form WH-226A
 Rev. December 2010

Certification Attestations



Every applicant must attest that:

- The employer has read the application form and to the best of his or her knowledge and belief, all answers and information given in the application and attachments are true
- The representations set forth in support of the application to obtain or continue the authorization to pay workers with disabilities at subminimum wage rates are true
- The authorization to pay SMWs, if issued or continued, is subject to revocation in accordance with the provisions of 29 CFR 525
- Workers employed (or who will be employed) under the authority in 29 CFR 525 have disabilities for the work to be performed
- Wage rates paid (or which will be paid) to workers with disabilities under the authority in 29 CFR 525 are commensurate with those paid experienced workers, who do not have disabilities that impair their performance, in industry in the vicinity for essentially the same type, quality and quantity of work

Certification Attestations



(cont'd)

- The operations are (or will be) in compliance with the FLSA, the Walsh-Healey Public Contracts Act (PCA), the McNamara-O'Hara Service Contract Act (SCA) and the Contract Work Hours and Safety Standards Act (CWHSSA), an overtime statute for Federal contract work
- No deductions will be made from the commensurate wages earned by a patient worker to cover the cost of room, board or other services provided by the facility
- Records required under 29 CFR 525 with respect to documentation of disability, productivity, time studies or work measurements, and prevailing wage surveys will be maintained
- The wage rates of all hourly rated employees paid in accordance with FLSA section 14(c) will be reviewed at least every six months
- Wages paid to all employees under FLSA section 14(c) will be adjusted at periodic intervals, at least once a year, to reflect changes in the prevailing wage paid to experienced workers employed in the vicinity for essentially the same type of work

Application Processing



- WHD Wage Specialists review each application for completeness, accuracy, and compliance with the provisions of section 14(c)
- Once the review is complete, a certificate will be issued or denied. If denied, the applicant will be advised
- Issuance of a certificate is not a statement by the Wage and Hour Division that the employer is in compliance with the provisions of the applicable Acts and does not provide the employer with a good faith defense should violations later be found

Application Processing



To expedite the certification process, employers should:

- Designate an individual within their organization who understands both the certification and compliance principles of FLSA section 14(c) to oversee the completion and submission of the application
- Submit a complete, accurate, and timely application that includes all the required supporting documentation
- Communicate with the WHD Certification Team as needed before, during, and after the submission of the application

Denial of Application



- A certificate will be denied if the application is incomplete, contains 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 for review

Certificate Expiration



- Certificates are issued with both an effective date and an expiration date
- Certificates, along with the employer's authorization to pay SMWs, expire on the indicated date unless the employer properly files an application for renewal with the Wage and Hour Division **before** the expiration date

Certificate Renewal



- Approximately two months before a certificate expires, as a courtesy, WHD will notify the employer that it is time to apply for a new certificate
- Renewal applications are submitted on WH-226 and WH-226A in the same manner as the initial application
- Employer is responsible for filing a proper and timely renewal application

Certificate Revocation



- A certificate may be revoked by the Administrator of WHD for the following reasons:
 - It is found that false statements were made or facts were misrepresented in obtaining the certificate. If this is the case, the certificate may be revoked back to the date of issuance.
 - It is found that the certificate holder violated any of the provisions of the FLSA or the terms of the certificate. If this is the case, the certificate may be revoked back to the date the violations began.
 - It is determined that the certificate is no longer necessary to prevent the curtailment of employment opportunities for workers with disabilities. If this is the case, the certificate will be revoked as of the date of the employer revocation notice.
- A petition for review may be filed with the Administrator within 60 days of the action.

Certification Questions



Contact the Certification Team at
(312) 596-7195

DETERMINING A SUBMINIMUM WAGE



- 1) Develop A Job Description
- 2) Determine The Prevailing Wage
- 3) Define The Work
- 4) Establish The Standard
- 5) Measure The Worker
- 6) Calculate And Implement Rate Of Pay

Develop a Job Description



Develop a Job Description



- A job description is important when determining the prevailing wage and when setting the standard upon which the subminimum wage will be based
- A detailed job description should:
 - Define the specific job duties, responsibilities, and tasks
 - Identify the types of equipment and supplies used to perform the tasks
 - List the types of skills, education, or experience levels required
 - Indicate the location and days and times of the week the work will be performed
 - Define and establish the minimum acceptable levels of quantity (how much production must be accomplished) and quality (how well the job must be performed)

Determine the Prevailing Wage



The Prevailing Wage



- A wage paid to an experienced worker who does not have a disability that impairs his/her ability to do the work and who performs essentially the same type of work in the vicinity
 - An experienced worker is a worker who has learned the basic elements or requirements of the work to be performed, ordinarily by completing a probationary or training period
 - Vicinity means the geographic area from which the labor force of the community is drawn
- May **not** be lower than the federal minimum wage, or where applicable, a higher state minimum wage

The Prevailing Wage



An employer may determine the prevailing wage for a job by:

- Surveying a representative number of comparable firms in the vicinity that employ primarily workers who do not have disabilities and who perform similar work

The Prevailing Wage



- Where surveys are not practical, the employer may obtain wage information from other sources such as the Bureau of Labor Statistics or private or State employment services
 - Employer must document and detail reasons why a survey could not be done

How to Conduct a Prevailing Wage Survey



- Solicit wage data from comparable businesses in the vicinity, preferably in writing
- Document and maintain the following information for each survey conducted:
 - Date of contact
 - Name, address, and phone number of firm or other source contacted
 - Name and title of individual contacted at each firm or other source
 - The wage rate information provided and the basis for concluding that each rate submitted was not based upon an entry-level position
 - A description of work for which wage information was collected
- This information must be retained for at least three years

The Prevailing Wage



Special situations where prevailing wage survey would not be required:

- An employer whose workforce primarily consists of workers without disabilities may choose to use its established rate paid to experienced workers
- A subcontractor may choose to use the wage rate the prime contractor pays experienced workers performing the same work in essentially the same way and with the same type of equipment

Calculating a Prevailing Wage



WEIGHTED AVERAGE vs. STRAIGHT AVERAGE

<u>EMPLOYER</u>	<u>NO. OF EMPLOYEES</u>	<u>ENTRY LEVEL WAGE</u>	<u>EXPERIENCED WORKER WAGE</u>	<u>GROSS WAGES</u>
XYZ, Inc.	43	\$10.00	\$11.55	\$496.65
ABC, Inc.	17	\$9.50	\$10.70	\$181.90
<u>RST, Ltd.</u>	<u>22</u>	\$9.95	<u>\$10.95</u>	<u>\$240.90</u>
TOTALS	3	82	\$33.20	\$919.45

Weighted Average $\$919.45 / 82 = \11.21280 or \$11.22

Straight Average $\$33.20 / 3 = \11.06667 or \$11.07

Calculating a Prevailing Wage



- Note that in the straight average example, the prevailing wage rate of \$11.06667 is rounded up to \$11.07 per hour.
- WHD will accept the practice of carrying out computations to the fifth decimal point and then rounding up to the fourth decimal place

Frequency of the Prevailing Wage Survey



- The prevailing wage survey must be conducted prior to paying a subminimum wage
- It 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 state minimum wage has been increased
 - Although some certificates remain in effect for two years, the prevailing wage surveys must be conducted no less frequently than once a year

Minimum Wage Increase



Whenever the state or federal minimum wage increases:

- Employers will have to review all prevailing wage rates and
- Employers may have to conduct new prevailing wage surveys *OR* adjust old prevailing wage rates to accommodate for the increase in the minimum wage

De-Skilling



- De-skilling means arbitrary downward adjustments made in prevailing wage rates to account for differences in duties, methods, equipment and responsibilities between the work of the worker with disabilities and the work of employees who do not have disabilities
- De-skilling is **NOT** permitted by the Wage & Hour Division

Define the Work



DEVELOPING A TASK ANALYSIS

Task Analysis



- A task analysis identifies:
 - Tasks and subtasks to be performed
 - Methods and procedures to accomplish task
 - The specific area where the work will be performed
 - Supplies and equipment necessary to perform the work
 - A definite start and stop point for the job/task
 - Environmental considerations
 - Minimum acceptable quality and quantity standards
- The written analysis must match the methods used by the workers to complete the job/task
 - “Standard procedures”

Establish the Standard



Work Measurement



- Determine the time it takes a worker who does not have a disability for the work to perform the job as set out in the task analysis
- Time becomes the “standard” against which the productivity of the worker with a disability is compared to determine the hourly commensurate wage
- The commensurate wage rate will be proportionate to the prevailing wage based on productivity differences
- The employer is responsible for demonstrating the standard has been properly established

Work Measurement



- Must be performed by a qualified, competent worker who does not have a disability for the work being performed and who possesses the necessary skill and training required to perform the job
- Must be completed at a pace that can be maintained over an entire shift
- Must make allowance for personal time, fatigue and unavoidable delays if used to set a piece rate

Work Measurement



- Work measurements must be conducted prior to paying a subminimum wage
 - As long as the job remains the same, new work measurements are not required
 - It is good practice to periodically review and confirm performance standards

Setting the Standard



- Employer must use an accepted method of industrial work measurement to determine the standard
 - Stopwatch time studies
 - Methods-Time Measurement (MTM)
 - Modular Arrangement of Predetermined Time Standards (MODAPTS)
- The work measurement accurately measures the quality and quantity of the same work when performed by workers who do not have disabilities

Setting the Standard



- Select an individual to conduct the study (the observer)
- Select worker(s) without a disability for the job being measured to be timed (standard setters)

Setting the Standard



The standard setter must be:

- Allowed to practice the work until he/she is comfortable, familiar and can perform the work without hesitation
- Capable of maintaining a consistent, efficient pace

Setting the Standard



The observer must:

- Assure that the standard setter performs the task exactly as it will be performed by the worker with a disability as specified on the task analysis
- Compare the standard setter's actions to the written procedures
- Structure the study to avoid “lost time” situations
- Time the standard setter's work using the same starting and stopping point identified in the task analysis

Setting the Standard



The observer must:

- Read the stopwatch and make recordings
- Document the standard measurement (quality and quantity)
 - If the minimum standards are not met, the worker is advised of the shortcoming(s) and the study will resume with the worker performing **rework**
- Conduct the study three times and determine average time

Work Measurements for Piece Rate



Similar to procedures for hourly wages:

- Need accurate description of work to be performed
- Need to select a standard setter
- Need to conduct a work measurement of individual(s) who do not have disabilities that will evaluate their performance of the work being measured
- Need to consider both quantity and quality of production

Work Measurements for Piece Rate



Different from work measurements for hourly:

- The worker with a disability is not observed/evaluated – only the standard setter
- Standard setter must be measured for a period long enough to ensure pace may be sustained throughout the day
- Must make an allowance for personal time, fatigue, and unavoidable delays (PF&D)

Personal Time, Fatigue and Unavoidable Delays (PF&D)



- PF&D must be taken into consideration when determining piece rates
 - ✦ Breaks, cleanup time, unavoidable delay time, fatigue, etc

Measuring PF&D



METHOD 1:

Conduct time studies of the standard setters for 25 minutes, and then multiply the number of completed units by 2

- Averaged results will yield the standard and will include a properly computed 10-minute PF&D
- ❖ Verify accurate SMW by multiplying the standard “units per hour” by the established “piece rate” to ensure that the results **equal or exceed** the full prevailing wage

Measuring PF&D



METHOD 1:

Example

- Prevailing wage = \$10.00
- 25 minute time studies resulted in an average of 40 units produced
- Standard = $40 \text{ units} \times 2 = 80 \text{ units}$
- Piece rate = $\$10.00 \div 80 \text{ units} = \0.13

Measuring PF&D



METHOD 2:

Multiply the standard time by an allowance factor of 1.20* to incorporate a 10-minute PF&D

*Using an allowance factor of 1.1764705 will provide a 9-minute PF&D

- ❖ Verify accurate SMW by multiplying the standard “units per hour” by the established “piece rate” to ensure that the results **equal or exceed** the full prevailing wage

Measuring PF&D



METHOD 2:

Example

- Prevailing wage = \$10.00; 20 minute time studies resulted in an average of 40 units produced
- Time to produce a single unit =
 $20 \text{ minutes} \times 60 \text{ seconds} \div 40 \text{ units} = 30 \text{ seconds}$
- Time with 10-minute PF&D: $30 \times 1.20 = 36 \text{ seconds/unit}$
- Standard = 1 hour (3600 seconds) $\div 36 \text{ seconds/unit} = 100 \text{ units}$
- Piece rate = $\$10.00 \div 100 \text{ units} = \0.10

Measuring Hourly Paid Workers



Evaluating Productivity



- Each hourly paid worker with a disability must:
 - be evaluated within the first month of initial employment
 - be evaluated at least every six months thereafter, or whenever there is a change in the methods used or materials used or whenever the worker changes jobs
 - perform the same tasks and use the same equipment as the standard setter
- Evaluation should not be done if:
 - the worker is not familiar with the job
 - the worker is fatigued
 - conditions are different than normal

Rework



- If quality and quantity standards have been met, the time as recorded is then compared to that of the standard setter
 - The percentage yielded is applied to the prevailing wage in order to determine the SMW
- If the minimum standards are not met, the worker is advised of the shortcoming(s) and the study will resume with the worker performing rework
 - The “clock” will be started again and continue while the worker corrects/completes the work to that point where it meets the minimum acceptable standards. The time spent during the initial study and rework are then added together and compared to that of the standard setter

Calculate and Implement the Hourly Commensurate Wage



Calculate Hourly Commensurate Rate



- Evaluate EACH worker's productivity within first month after employment (or beginning a new job)
- The productivity is compared to the established standard to calculate a percentage
- Prevailing wage is multiplied by worker's productivity percentage
- The worker's productivity must be re-evaluated every six months at a minimum
 - ✦ Must not be done when worker is fatigued
 - ✦ Recommend worker be timed on three different occasions and the results averaged

Recordkeeping, Notification, and Posting Requirements



Records



The following must be maintained:

- Records that document that the workers who are paid SMWs have disabilities that impair their productivity
 - ✦ Medical, psychiatric, psychological tests that support nature of disability
- Records that document the accuracy and timeliness of the employer's establishment of prevailing wages
 - ✦ Contact between the employer and the businesses surveyed
 - ✦ The wage rate information provided by the comparable employers and the basis for concluding that each rate submitted was not based upon an entry-level position
 - ✦ A description of work for which wage information was collected

Records



(cont'd)

- ✦ Records of the time measurements the employer conducted to establish the standard for each job for which workers with disabilities are paid subminimum wages
- ✦ Records of the productivity ratings of the workers with disabilities that document that the ratings were conducted properly and in a timely manner and that employee wages were adjusted accordingly by the end of the next pay period
- ✦ Records identifying time spent by employees with disabilities at the employer's establishment or in transit that are not considered hours worked and not compensable, such as receiving vocational or life skills training, receiving medical treatment, home-to-work travel, and performing simulated work

Notification Requirements



Each worker with a disability and, when appropriate, the parent or guardian of such a worker, shall be informed orally and in writing by the employer of the terms of the certificate under which such a worker is employed

Posting Requirements



- FLSA Minimum Wage Poster
- Notice to Workers with Disabilities Paid at SMW
- Family and Medical Leave Act Poster (if covered)
- Notice to Employees Working on Government Contracts (if subject to SCA or PCA)
- Employee Polygraph Protection Act Poster

McNamara-O'Hara Service Contract Act



PREVAILING WAGE AND FRINGE BENEFITS

Interaction with Service Contract Act (SCA)



- SCA allows employers to pay service employees with disabilities a SMW less than the prevailing wage required by the wage determination
- Employers **MUST** pay full fringe benefits, or the equivalent cash payment in lieu of providing the benefits

Interaction with Service Contract Act (SCA)



- FLSA section 6(e) requires prime contractors or subcontractors on SCA contracts to pay all employees employed at an establishment where SCA work is performed - whether covered under the FLSA or not - at least the FLSA MW wage for all hours worked
- Employers who have obtained a section 14(c) certificate may pay a SMW to SCA service employees and other employees not working on the contract who have disabilities for the work being performed

Executive Order 13658



ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

Executive Order 13658



- Establishes a minimum wage to be paid to workers performing on or in connection with a covered contract with the Federal Government
- Workers covered by this Executive Order and due the full Executive Order minimum wage include workers with disabilities whose wages are calculated pursuant to certificates issued under section 14(c)

Executive Order 13658



- Certificate holders may continue to pay commensurate wages to workers with disabilities, as permitted by section 14(c), who are employed on or in connection with Executive Order covered contracts only if the commensurate wage rate is higher than the Executive Order minimum wage

Executive Order 13658



- Other staff employed by a certificate holder may also be covered by the Executive Order
 - The Executive Order minimum wage protections apply to all workers who directly perform the specific services called for by the contract's terms
 - The Executive Order minimum wage protections also apply to FLSA-covered employees who are performing work activities that are necessary to the performance of a covered contract but who are not directly engaged in performing the specific services called for by the contract itself if at least 20% of their hours worked in a given workweek are in support of a covered contract

Executive Order 13658



Please see the following website for detailed information on Executive Order 13658 and its impact on section 14(c)
<http://www.dol.gov/whd/flsa/eo13658/index.htm>

Common Errors To Avoid



Common Errors



- Use of entry level rates or minimum wage for prevailing wage rates
- Failure to conduct prevailing wage survey at a minimum of annually
- Use of behavioral factors to establish hourly commensurate wages for workers with disabilities
- Use of incorrect personal time, fatigue, and unavoidable delays (PF&D) allowance factor in calculating piece rates

Common Errors



(cont'd)

- Improper rounding
- Failure to maintain an accurate task analysis
- Failure to use correct wage determination rate for SCA work classification
- Failure to pay full fringe benefits required by SCA wage determination
- Allowing section 14(c) certificate to expire

Questions?



Visit the WHD homepage at:

<http://www.dol.gov/whd>

Call the WHD toll-free information and helpline at:

1-866-487-9243

Use the DOL interactive *ELAWS* system:

<http://www.dol.gov/elaws/esa/flsa/14c>