# 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

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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

#### OR

- A for-profit or nonprofit firm engaged in the operation of a:
  - o hospital;
  - o 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:

x 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
  - o 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)
  - x 2 year certificates
- Establishments that employ patient workers
  - x 2 year certificates
- Business establishments
  - x 1 year certificates
- School Work Experience Programs (SWEPs)
  - x 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 (SWEP)

 Must obtain a certificate from WHD to pay SMWs to students with disabilities

 Certificates are issued to the schools administering the SWEP, 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
  - o 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

<ol> <li>a. This is a request for authority to employ workers with disabilities for (Check All Boxes that Apply):</li> </ol>	For USDOL Use Only			
Community Rehabilitation Center (Work Center)	Certificate Number			
Hospital/Residential Care Facility (Patient Workers)	Effective Date//Expiration Date//			
Business Establishment (Special Workers)	RO DO			
School Work Experience Program (SWEP)	Remarks			
b. This is (Check One):	Employees Paying SMW's Yes No			
☐ Initial Application (Complete All Items)	Number of sites to receive a certificate			
Renewal Application (Please Make Any Necessary Corrections to Reprinted Information)	Print Certificate Yes No WS			
Current Certificate Number:	6. List the name and address(es) of all branch establishments (BR), supporter			
2. Name of Employer	<ul> <li>employment sites, including enclaves (SE), or school work experience program sites (SWEP) to be covered by this certificate. Note: A separate</li> </ul>			
	Supplemental Data Sheet (WH-226A) must be completed for every estab lishment where you employ workers with disabilities at special minimum			
Street Address	wages (including your main establishment and each establishment lister			
Mailing Address (If Different than Street Address)	below). See page 4 of this application for definitions of BR, SE and SWEF Attach additional sheets if necessary.			
VV R. 101 D. S. L. 100 S. M. 100 M. 1	Indicate if BR,			
City County	SE or SWEP Name & Address of Site			
State Zip Code				
Federal Employer Identification Number (EIN)				
Person USDOL should contact				
Telephone ( )	1			
telephone ()	-			
<ol><li>Parent Organization if different from that listed in #2:</li></ol>				
Name				
Address				
The second secon	7. Do you manufacture items for the Federal Government under PCA?			
Check here if mail is to be sent to parent organization rather than #2.	Yes No  Do you perform any services for the Federal Government under SCA?			
4. Status (Check One):	Do you perform any services for the Federal Government under SCA?			
Public (State or Local Government) Private, For Profit	✓ Remember to attach copies of all current SCA Wage Determinations to			
Private, Not For Profit	those contracts upon which workers with disabilities are employed and earning special minimum wages.			
5. Primary Disability Group Employed (Check One):				
Mental Retardation (MR) Alcoholism (AL)	General — No Primary Group (GI)			
Mental Illness (MI) Drug Addictions (DA)	Age Related (AR)			
☐ Visual Impairment (VI) ☐ Neuromuscular (NM)	Other (OT) Specify:			
☐ Hearing Impairment (HI) ☐ Developmental Disability (D	D) Specify:			

impaired by their disabilities and were paid special minimum SWEP

orkers with disabilities are paid an hourly rate or a piece rate. The not have disabilities and utilize similar methods and equipment. Determination" and provide the information obtained from these

Date of Contact	Prevailing Wage Provided by Source	Prevailing Wage Determined by Applicant
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ved special minimum wages and were paid hourly rates during

a disability who is paid a special minimum wage? loyed workers with disabilities who are paid hourly rates (if you of the three employees for whom data is submitted must pertain ws the worker's individual productivity in proportion to the wage ing essentially the same type, quality and quantity of work in

which workers with disabilities earning special minimum wages

b Hour)	Standard Productivity (Units/Hour)	Piece Rate Paid to Workers (Rate per Unit)
		Form WH-226 Rev. December 2010

such, receiving Social Security Benefits such as SSI or

IG THE MINIMUM WAGE OR SPECIAL MINIMUM WAGE nstances, to count toward its minimum obligations the Check the box if you are crediting the cost of providing vage or special minimum wage obligations to workers with

m administered by a State agency or the U.S. Veterans

special minimum wages pursuant to a vocational red disability or a vocational rehabilitation program emporary authority provided the application is mailed to the stays of the signing. Temporary authority will exist for 90 he issuing agency. (See 29 C.F.R. § 525.8 and instructions

and information given in the application and attachments tue the authorization to pay workers with disabilities at ontinued, is subject to revocation in accordance with the

abilities, the following conditions exist and will continue

ork to be performed:

are commensurate with those paid experienced workers, ality, and quantity of work;

d Contract Work Hours and Safety Standards Act

r to cover the cost of room, board or other services provided productivity, time studies or work measurements, and

4(c) will be reviewed at least every six months;

ervals, at least once a year, to reflect changes in the n the vicinity for essentially the same type of work.

a collection of information unless such collection displays ng burden for this collection of information will average 45 sources, gathering and maintaining the data needed, and collection is mandatory in order to obtain the authority to ents regarding the burden estimate or any other aspect Administrator, Wage and Hour Division, U.S. Department eference the OMB Control Number.

Form WH-226 Rev. December 2010

r Standards Act (FLSA), the Walsh-Healey Public Contracts m wages to workers with disabilities is authorized only under stration may also request immediate temporary certificate

bor, Employment Standards Administration, Wage and Hour 2) 596-7195 Keep a copy of the application for your reco d workshop) is a facility that is engaged primarily in providing is a worker with a disability who is employed by a hospital or business establishment, for purposes of this application, hat is seeking permission to employ workers with disabilities ed program by which students with disabilities may be placed

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

orise. A supported employment work site is a location, outside in the work center or rehabilitation center, where workers with ork center staff (job coaches). An enclave is a supported by staff from the work center. A school work experience ed a student(s) with disabilities to work in a job(s) at special

#### (SWEPS)

on covering all of the students with disabilities and all of the mpliance with all applicable child labor laws, minimum wage work experience program must be paid commensurate wage ed workers who do not have disabilities performing essentially Complete all items except 12.

students with disabilities are employed at special

ORS OR VETERANS ADMINISTRATION TION TO PAY SPECIAL MINIMUM WAGES

re to be placed e or State vocational rehabilitation agency

a disability is being placed

mployed at special minimum wages

as Administration Training Officer

Form WH-226 Rev. December 2010

#### 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
	mit with the Application I	or Authority to Em	ploy Workers with	h Disabilities at Special I	n wages during your most recently Minimum Wages (WH-226). These to this form.
1. Name of work site				3. This work site is	s (check one)
2. Address of work site				ME	Your Main Establishment
				BR	Branch Establishment
_				SE	Supported Employment Site, Including Enclaves
_				SWEF	School Work Experience Program Site
Is SCA work performed at the Below, list all employees with disa information in alternative formats, as necessary.	bilities paid special minim	num wages during			
Below, list all employees with disa information in alternative formats,	bilities paid special minim for example computer pri	num wages during	your most recentle all the requested	y completed fiscal quarte	fou may attach additional sheets
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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 form the work center or rehabilitation center, where workers with disabilities paid special minimum wayes are placed in employment settings along with work center staff (b) 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 though 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 6/30/11. He worked 300 hours that quarter, so bits 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	Average Earnings per Hour
John Jones	MR	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 Bey 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

- A wage paid to an <u>experienced worker</u> 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 <u>vicinity</u>
  - 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

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

- 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

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

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

- 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

 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)

#### 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

#### 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

#### 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 <u>equal or exceed</u> 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
   minutes × 60 seconds ÷ 40 units = 30 seconds
- Time with 10-minute PF&D:  $30 \times 1.20 = 36$  seconds/unit
- Standard = 1 hour (3600 seconds) ÷ 36 seconds/unit =
   100 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:
  - o 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
  - o the worker is fatigued
  - o 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

# ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

- 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)

 <u>Certificate holders</u> 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

- 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

\*Please see the following website for detailed information on Executive Order 13658 and its impact on section 14(c)\*

<a href="http://www.dol.gov/whd/flsa/eo13658/index.htm">http://www.dol.gov/whd/flsa/eo13658/index.htm</a>

# 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: <a href="http://www.dol.gov/elaws/esa/flsa/14c">http://www.dol.gov/elaws/esa/flsa/14c</a>