

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

This Fact Sheet provides general information concerning the establishment of prevailing wages and commensurate wages as they pertain to the employment of workers with disabilities at subminimum wages. Please read [Fact Sheet # 39](#), The Employment of Workers with Disabilities at Subminimum Wages, for an overview of the general provisions of [FLSA](#) Section 14(c). Please consult the Regulations, [29 CFR Part 525](#), Employment of Workers with Disabilities under Special Certificates, for detailed information concerning Section 14(c).

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

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

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

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

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

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

Determine the relative productivity level of each worker with a disability and compare it to the standard established by the worker who does not have a disability. Apply this percentage to the prevailing wage to determine that worker's commensurate wage. Simply put, if the prevailing wage is \$8.00 per hour and the

worker with a disability receives a 60% productivity rating, the commensurate wage for that worker would be \$4.80 per hour (\$8.00 multiplied by 60%).

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

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

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

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

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

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

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

What is factoring and is it an acceptable practice?

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

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

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

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

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

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

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

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

is imperative that both the standard setter and the worker with a disability be held to the same minimum acceptable standards of quality and quantity.

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

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

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

Under the 90/10 Rating, the standard setter must meet the pre-established minimum acceptable quality and quantity standards when being time studied. If he or she fails to meet those standards, the employer must either redefine the standards to comport with the performance of the workers who do not have disabilities or conduct additional time studies to validate the standards.

Where to Obtain Additional Information

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

For more information about these provisions, review the other Fact Sheets in this series which address Section 14(c) compliance issues located at <http://www.dol.gov/whd/fact-sheets-index.htm>.

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

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