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**64a GENERAL****64a00 Introduction.**

- (a) Section 14(c) of the Fair Labor Standards Act (FLSA) has contained provisions to employ workers with disabilities at subminimum wages since it was enacted in 1938. A subminimum wage is a wage paid a worker with a disability that is *commensurate* with that worker's individual productivity as compared to the wage and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the vicinity where the worker with a disability is employed. The commensurate wage is always a subminimum wage (*i.e.*, a wage below that required by section 6(a) (*see* FOH 64g05) or below the rate required by the McNamara-O'Hara Service Contract Act (SCA) wage determination, where applicable).
- (b) Employers with the appropriate certificates may pay workers with disabilities a *commensurate wage* (*see* FOH 64g05). This minimum wage exemption exists because people with disabilities may not be able to compete successfully with workers who do not have disabilities for jobs paying the minimum wage. The main objective of the exemption was, and remains, to encourage employment opportunities for workers whose earning or productive capacities have been diminished by their disability. The payment of subminimum wages to workers with disabilities is codified at section 14(c) of the FLSA. This section was last amended on 10/16/1986. 29 CFR 525 sets forth the conditions and terms governing the employment of workers with disabilities at subminimum wages.
- (c) It is the policy of the Wage and Hour Division (WHD) to carry out a vigorous, consistent, and effective enforcement program with respect to employment of workers with disabilities under section 14(c). This policy is essential because many of the workers with disabilities paid at subminimum wages have little knowledge of their rights under the various acts enforced by the WHD or may be unable to exercise them. In addition to WHD activities to protect workers with disabilities, there are also various interested parties that act on behalf of the workers with disabilities and/or the work centers that employ them. Because the Wage and Hour Investigator (WHI) may have contact with these groups, a few of the more prominent ones are listed in the glossary near the end of this chapter. Although some of these groups and consulting agencies have prepared their own compliance manuals and have been provided feedback by the WHD, none of their documents has been approved by the WHD and none provides a good faith defense in case violations are disclosed.
- (d) Unless specifically noted, employers who employ workers with disabilities are subject to the same FLSA, SCA, and/or Walsh-Healey Public Contracts Act (PCA) rules of coverage, employment relationship, exemptions, child labor restrictions, and principles regarding such things as hours worked and recordkeeping as those who employ workers who do not have disabilities.

**64a01 Worker with a disability.**

- (a) The term "worker with a disability" is defined in section 14(c)(1) as an individual "whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury." Some examples of disabilities that may affect a worker's earning or productive capacity include *blindness, intellectual or developmental disability, mental retardation, cerebral palsy, alcoholism, drug addiction, and age*. Age may be considered an impairment to earning

- or productive capacity only when the individual is at least 70 years old *and* age impairs his or her productivity for the work to be performed. The fact that a worker is over 70 years of age does not, in and of itself, constitute a disability under section 14(c).
- (b) A subminimum wage may be paid only when an individual has a disability for the work he or she is employed to perform. While a disability may affect a worker’s earning or productive capacity for one type of work, the same disability may have no impact on his or her ability to perform another kind of work. Only when a disability impairs the individual for the job to be performed may an employer pay a subminimum wage.
- (1) A worker may have a disability for one type of work but not be impaired for other types of employment. Some workers, after acquiring proper training and/or experience, successfully overcome disabilities in the workplace and should no longer be paid a subminimum wage.
  - (2) The fact that a worker is a client or consumer of a facility specializing in rehabilitation, teaching independent living skills, and/or job training, in and of itself, does not make the worker a *worker with a disability* and eligible to be paid a subminimum wage. The worker must still have a disability for the work he or she is employed to perform.
- (c) Vocational, social, cultural, or educational disabilities, standing alone, are not disabilities under section 14(c). Examples include chronic unemployment, receipt of welfare benefits, nonattendance at school, juvenile delinquency, and correctional parole or probation. However, these conditions could meet the section 14(c) definition of a disability if they exist in conjunction with some other physical and/or mental deficiency or injury (*see* 29 CFR 525.3(d)).
- (d) Alcoholism and drug addiction can also be disabilities that affect the earning or productive capacity of a worker (*see* 29 CFR 525.3(d)).
- (1) When other documentation of alcoholism is not available, the *Michigan Alcoholism Screening Test (MAST)* will be sufficient to determine whether an individual is disabled for the work to be performed due to alcoholism. The MAST is a short survey of 25 “yes” or “no” questions designed to detect alcoholism. A score of 7 or higher, along with the worker’s written admission of alcoholism, is considered sufficient substantiation that the individual is disabled due to alcoholism.
  - (2) Although the MAST can be administered in a short period of time by either a professional or nonprofessional, the WHI should not administer the test. If documentation is needed to prove someone is disabled due to alcoholism, the WHI should recommend that a representative of the employer administer the MAST.
  - (3) Employers should be advised that information about the MAST and the actual screening device are available on the internet. One such site is [www.nau.edu/~fronske/MASTa.htm](http://www.nau.edu/~fronske/MASTa.htm).
- (e) A learning disability, under certain conditions, may be a disability that impairs the earning and/or productive capacity of workers.

- (1) Unlike other disabilities, the terms “learning disability” or “learning disabled” do not have precise definitions. Learning disability or learning disabled describes a number of learning or behavioral disabilities, ranging from mild to severe, which may manifest by various combinations of impairments in perception, conceptualization, language, memory, and control of attention, impulse, or motor function.
- (2) An individual may be considered learning disabled if either of the following situations exist:
  - The disorder has been diagnosed by a physician or a licensed or certified psychologist who is skilled in the diagnosis and treatment of such disorders. The disorder results in a substantial impairment to employment, and there is a reasonable expectation on the part of the physician or psychiatrist that vocational rehabilitation services may enhance the employability of the individual.
  - The state vocational rehabilitation agency, or another qualified agency, has determined that the individual in question is substantially disabled for employment, and the individual has been treated as learning disabled or had a history of receiving special education for the learning disability.
- (3) If learning disability is listed as an individual’s sole disability but the requirements mentioned in FOH 64a01(e)(2) above are not met, that individual may not be considered to have a disability under 29 CFR 525.3(d).
- (4) Some difficulties that are indicative of a learning disability, and may affect the productivity of the individuals include:
  - a. Needing to work longer hours to produce the same amount as their coworkers
  - b. Needing to choose between being careless or being slow
  - c. Making more frequent errors than coworkers
  - d. Misunderstanding instructions from supervisor or comments from coworkers
  - e. Failing vocational training
- (5) Individuals with a learning disability as the primary disability do not normally require long-term placement at subminimum wage jobs in work centers. Consequently, the WHD recommends that work centers re-evaluate and update the data used to justify employing learning disabled workers at a subminimum wage on an annual basis. The WHI should review this documentation, as necessary, when making a determination that an employee has a disability for the work being performed.
- (6) Some states are now automatically labeling as “learning disabled” those Welfare-to-Work participants who do not find private sector employment within a certain period of time, often 6 weeks. Some states are placing these individuals in work centers that pay subminimum wages. WHIs should contact their regional enforcement coordinator: section 14 for guidance when encountering this situation.

**(f) Patient worker**

- (1) A “patient worker” is a worker with a disability, as defined in 29 CFR 525.3(e), who is receiving treatment or care from a hospital or institution that also provides residential care, *and* is also employed by that same hospital or institution to do work in the facility. As with all workers with disabilities who are paid subminimum wages, the patient worker must have a disability that impairs the work he or she will actually be performing.
- (2) The individual does not have to be a resident of the hospital or institution in order to meet the definition of a patient worker and receive a subminimum wage. The individual may be an outpatient, but he or she must be receiving treatment from the hospital or institution.

**64a02 Impact of the Americans with Disabilities Act on section 14(c).**

- (a) The Americans with Disabilities Act (ADA), which took effect 07/26/1992, prohibits employers from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The Office of the Solicitor (SOL) has reviewed the ADA and its legislative history and has concluded that the ADA does *not* nullify the provisions of section 14(c). The ADA affords protection to individuals who, with or without reasonable accommodation, can perform the essential functions of the job. An employer is not required to lower quality or production standards to make an accommodation.
- (b) In order to determine the commensurate wage of a worker with a disability for purposes of section 14(c), the employer must, among other things, determine the productivity of a worker who does not have a disability for the work to be performed, by conducting appropriate work measurements or time studies. The production standard, along with the prevailing wage, becomes the basis for paying commensurate wage rates. Thus, the standard for compensation, if not the amount of compensation itself, is the same for the worker who has a disability as for the worker who does not have a disability.
- (c) The SOL has advised us that the existence of a certificate under section 14(c) would not protect an employer from charges pursuant to the ADA. Section 14(c) requires commensurate wage rates but does not address the issues of discrimination or reasonable accommodation. Thus, it would be possible for an employer to be in compliance with the provisions of section 14(c) but be in violation of certain provisions of the ADA. Questions regarding possible action under the ADA should be addressed to the appropriate office of the U.S. Equal Employment Opportunity Commission (EEOC).

**64b**      **COVERAGE****64b00**    **Introduction.**

- (a) Workers with disabilities may be employed anywhere by a variety of employers. Examples of businesses in which WHIs will most likely encounter section 14(c) subminimum wage certificates include, among others:
- (1) Community rehabilitation programs (CRPs) and work centers, formerly known as sheltered workshops (SWSs), which specialize in the employment of workers with disabilities and may also provide rehabilitation
  - (2) Hospitals and residential care facilities that may also employ their patients
  - (3) For-profit business establishments (*e.g.*, fast food establishments or grocery stores)
  - (4) Contractors, including work centers described in FOH 64b00(a)(1) above, who provide services under the SCA, or manufacture or supply goods under the PCA
  - (5) State-operated vocational rehabilitation centers
- (b) As in any other kind of compliance action, the WHI must first ascertain coverage (*i.e.*, enterprise, individual, and/or PCA or SCA). Even when coverage has been established, the WHI should be aware that not all of the activities performed at CRPs and work centers constitute an employment relationship and/or hours worked (*see* FOH 64e01).
- (c) Although it is rare for workers who receive subminimum wages to work in excess of 40 hours in a week, their employment is covered under the overtime provisions of the FLSA, the PCA, and/or the Contract Work Hours and Safety Standards Act (CWHSSA), where applicable.
- (d) Minors with disabilities who are employed at subminimum wages must be employed in compliance with all child labor provisions.

**64b01**    **Enterprise coverage.**

- (a) **FLSA section 3(s)(1)(A) coverage (annual dollar volume (ADV) test)**
- (1) Work centers operated for-profit will be section 3(s)(1)(A) enterprises, and covered on an enterprise basis, if they meet the required dollar volume test.
  - (2) Not-for-profit work centers will *not* be considered section 3(s)(1)(A) enterprises, regardless of ADV. Not-for-profit status generally means the employer qualifies under section 501(c)(3) of the Internal Revenue Code as nonprofit. The activities of these not-for-profit work centers are not ordinarily considered to have a business purpose, as required by section 3(r) (*see* 29 CFR 779.214).
    - a. Despite this absence of enterprise coverage, the employees of many work centers will be covered on an individual basis.
    - b. Also, if the work center has an SCA contract(s), *all* employees, whether working on the contract(s) or not, who are not otherwise exempt under FLSA section 13(a)(1) are covered under FLSA section 6(e). If these workers are

not covered by an applicable SCA wage determination, they must be paid at least the FLSA section 6(a)(1) minimum wage (*see* FOH 64b03(d)) or a commensurate wage rate, if they have disabilities for the work performed and the employer is properly certified.

- (3) The retail outlets of not-for-profit work centers and/or retail establishments operated by not-for-profit work centers *may be covered* under section 3(s)(1)(A) of the act, however, if their ADV meets the required amount. These retail operations are considered to have a business purpose. Only sales and business done from the retail operation will be counted toward the ADV. Assertion of such coverage must first be cleared by the WHI with the National Office (NO), Office of Policy (OP), Division of Enforcement Policy and Procedures (DEPP), Family and Medical Leave Act and Other Labor Standards (FMLA/OLS) Branch.
  - a. The Supreme Court decided in *Alamo Foundation v. Secretary of Labor* that despite the “nonprofit” corporate status of an organization, if it engages in commercial activities in competition with other businesses, its employees “like other employees of the Act... are entitled to its full protection.”
  - b. Even though the work center operates a retail outlet covered under section 3(s)(1)(A), this coverage will not extend to the not-for-profit work center. However, employees who work in covered employment in any part of a week are covered for the entire workweek.

(4) *Competitive employment*

A competitive employment setting refers to a work environment in which workers with disabilities are integrated with the general working population, as opposed to working in a separate facility that primarily employs workers with disabilities (formerly known as an SWS). Coverage for a commercial establishment holding a section 14(c) certificate is determined in the same manner as it is for any other employer (*i.e.*, enterprise coverage if the ADV test is met, and individual coverage if appropriate). In some situations, the worker with a disability may be jointly employed (*i.e.*, employed by both the commercial establishment and the work center that oversees the competitive employment situation (*see* FOH 64c09)).

**(b) Section 3(s)(1)(B) named enterprise coverage (hospital, institution, school)**

- (1) Enterprise coverage is extended without an ADV requirement to work centers that are operated in or as part of a hospital; an institution primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises (*e.g.*, a group home for people with intellectual or developmental disabilities); or a school.
- (2) Individuals employed by such enterprises are protected by all the provisions of the act whether they are staff or clients of the covered enterprise (*see* FOH 12g00 -02, FOH 12g12, and FOH 12g14 -15).
- (3) Enterprise coverage under section 3(s)(1)(B) would *not* apply, however, to a work center operated by a group home or other institution that had totally and completely segregated its work center activities from its residential care functions. Such a degree of segregation would be met when:



- a. the work center is not housed in one of the group homes;
  - b. bookkeeping and payroll records for the work center and the group home are kept separately, and
  - c. staff and funding are not shared, or intermingled, between the work center and the group home.
- (4) If the enterprise has accomplished the degree of segregation discussed above, enterprise coverage shall not be asserted for the work center.
- (5) CRPs may operate both work centers and group homes. Enterprise coverage under section 3(s)(1)(B) will not be extended to a work center based *solely* on the fact that a few staff members may be employed in both locations. The work of such employees, however, would be covered based on their work in the residential care enterprise, and the possibility of overtime violations should not be overlooked.
- (6) Because a patient worker is one “employed by a hospital or institution providing residential care,” his or her employer will be a covered enterprise under section 3(s)(1)(B). The employer must hold a certificate under section 14(c) in order to pay a subminimum wage to patient workers.

**(c) Section 3(s)(1)(C) coverage (a public agency)**

A work center operated by a state or local government, or another public agency, is covered on an enterprise basis under this section of the act. No ADV test must be met.

**(d) Section 6(e)**

- (1) Many work centers have service contracts with the Federal Government or are subcontractors on such contracts. Section 6(e) of the FLSA requires an employer who is either a prime contractor or a subcontractor on a contract to provide services to the Federal Government to pay all employees, *including staff and employees not working on the service contract*, at least the FLSA minimum wage (*see* FOH 64b03). Employers who have obtained the proper certification under section 14(c) may pay a subminimum wage to SCA service employees and other employees not working on the contract who have disabilities for the work being performed.
- (2) Since section 6(e) does not require that the employee be engaged in commerce or the production of goods for commerce, section 6(e) is a useful tool for applying minimum wage coverage to employees and staff who are not otherwise covered on an individual or enterprise basis (*see* FOH 64b03(d)).

**64b02 Individual coverage.**

- (a) Since some facilities are not covered on an enterprise basis, the WHI must frequently determine if employees are covered individually. Workers are covered on an individual basis if they are engaged in commerce, in the production of goods for commerce, or if they are performing work that is closely related and directly essential (CRADE) to the production of goods for commerce (*see* FLSA sections 3(j) and 6(a)).

(b) Typical work activities that result in employees being covered on an individual basis include:

(1) *Subcontract work*

A work center or other employer may obtain contracts requiring the assembling, packaging, or sorting of goods that, after the work is done, move from the work center directly into the stream of interstate commerce or back to the contractor who, in turn, ships them in interstate commerce.

(2) *Primary manufacturing*

A work center or other employer may manufacture or produce goods and then ship them directly or indirectly into interstate commerce.

(3) *Salvage operations*

A work center or other employer may collect used goods that are reprocessed, salvaged, or repaired and then sold to dealers who return them to the flow of interstate commerce.

(c) A worker with a disability engaged in work described in FOH 62b02(b) above would be covered on an individual basis in every workweek when such work occurred. Moreover, any worker who performed work CRADE to the covered activity would also be covered on an individual basis.

(1) Typical CRADE workers include janitors sweeping the floor in areas where goods are produced for interstate commerce; bookkeepers processing payroll for workers producing goods for interstate commerce; and material handlers, warehouse workers, and helpers who box, move, and load goods to be shipped in interstate commerce.

(2) If employees are engaged in both covered and non-covered work in the same workweek, they are covered for all hours worked in that workweek (*see* 29 CFR 776.4 and FOH 11a01).

### **64b03 McNamara-O’Hara Service Contract Act (SCA) coverage.**

(a) An employer with a contract entered into by the United States (U.S.), or the District of Columbia (DC), the principle purpose of which is to furnish services through the use of service employees, is covered under the SCA. This includes employers who operate work centers. All contracts in excess of \$2,500.00, or for an indefinite dollar amount, require a wage determination specifying the prevailing wage and fringe benefits for different classifications of work. If the award amount on a contract is less than \$2,500.00, the FLSA minimum wage is the applicable SCA prevailing wage rate (*see* 29 CFR 4.5 -.6 and FOH 14).

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

- (c) The overtime requirements of the CWHSSA apply to workers with disabilities performing the duties of laborer, mechanic, guard, or watchman on SCA contracts valued in amounts that exceed \$100,000.00 (*see* FOH 15a03).
- (d) As mentioned in FOH 64b01(d) above, FLSA section 6(e) applies to employers with contracts to provide services under the SCA. It provides FLSA section 6(a)(1) minimum wage coverage even for those employees who do not work on the contract. Workers with disabilities who are subject to section 6(a) because their employers are SCA contractors, but do not themselves perform covered contract work, may still be paid subminimum wages under section 14(c) provided the employer has a valid certificate.
  - (1) As an enforcement policy, the WHD will apply the minimum wage standard provided by section 6(e) only within an establishment in which work is performed on a government service contract (*see* FOH 30e01).
  - (2) The application of section 6(e) depends on the performance of contract services and not on the coverage or exemption status of the establishment under the FLSA. Thus, during any workweek in which the establishment is engaged in the performance of contract services, the wage rate provided in section 6(a) of the FLSA would be applicable to all employees of the establishment, other than those specifically exempt under section 13(a)(1) of the FLSA or those subject to a higher wage rate pursuant to the SCA (*see* FOH 30e02).

**64b04 Walsh-Healey Public Contracts Act (PCA) coverage.**

- (a) Workers with disabilities and other employees of a work center engaged in work on a PCA contract are covered under this act.
- (b) The subminimum wage paid on a PCA contract is based on at least the minimum wage rate required by section 6(a)(1) of the FLSA. However, if there is FLSA coverage concurrent with PCA coverage, the prevailing wage on which the FLSA section 14(c) commensurate wage rate is based will most likely be higher than the rate required under the PCA, depending on the prevailing wage survey results required by 29 CFR 525.10. When this is the case, the worker with a disability would be due the commensurate rate based on the higher of the two prevailing rates.
- (c) PCA overtime provisions would also apply to covered workers with disabilities who are receiving subminimum wages under section 14(c).

**64b05 Davis-Bacon and Related Acts (DBRA).**

- (a) There are no provisions in the Davis-Bacon and Related Acts (DBRA) that allow for the payment of subminimum wages for work performed by individuals who have disabilities for the work being performed. Therefore, all laborers and mechanics performing work covered by the DBRA are entitled to receive the full wage determination rate and fringe benefits for the job classification(s) actually performed.
- (b) In a like manner, all laborers, mechanics, guards, and watchmen, with or without disabilities, performing on DBRA contracts in excess of \$100,000.00 are entitled to overtime payment under the CWHSSA.



**64c EMPLOYMENT RELATIONSHIP****64c00 General.**

The relationship between individuals with disabilities and the facilities that serve their needs often includes general vocational training and training in general life skills, neither of which constitute hours worked. The time spent in these activities varies as the needs of each individual differ. Thus, the WHI may observe the individual with a disability performing many different activities, including some that would not constitute hours worked, and therefore, are not compensable. Since both work and non-work activities may occur during the same day, the WHI must consider the nature of each activity carefully in order to determine when the individual is performing as an employee (*see* FOH 64e01 for more information on hours worked).

**64c01 Patient worker.**

- (a) A major factor in determining if an employment relationship exists between a patient and a hospital, or other residential care facility, is whether the work performed is of any consequential economic benefit to the institution. The circumstances resulting in the individual's confinement, whether voluntary or pursuant to a civil court order, are immaterial to the patient worker's employment status.
- (1) Generally, work is considered to be of consequential economic benefit if it is the type that workers who do not have disabilities normally perform, in whole or part, in the institution or elsewhere. This is true even though the work has therapeutic value, or the patient's performance level is substandard.
  - (2) It does not matter whether the patient worker resides on the premises of the hospital and/or institution, or is receiving treatment on an outpatient basis. But the worker must be receiving treatment from the facility to qualify as a patient worker.
  - (3) Examples of work frequently done by patients that meet the consequential economic benefit test include general building maintenance, landscaping, office work, and janitorial and cleaning work (except for personal cleaning chores such as maintaining one's own quarters) (*see* 29 CFR 525.3(g), 29 CFR 525.4, and FOH 10b34).
- (b) If a patient is undergoing evaluation or training, the WHD will not consider the patient to be an employee during his or her first 3 months in work activities, provided the following two criteria are met:
- (1) The patient spends no more than 1 hour a day and no more than 5 hours a week in the work activities. The NO, OP, DEPP, FMLA/OLS Branch shall be consulted for possible individual exceptions to this rule.
  - (2) The patient is provided competent instruction and supervision throughout the 3-month period.
- (c) An employment relationship does not exist when the patient volunteers to perform services that the institution would not pay for, if performed by someone other than the patient. Examples of such activities include wheeling another patient around in a wheelchair, or planting and tending a vegetable garden when the produce belongs to the patient.

- (d) When an employment relationship is found to exist between the hospital or other institution and the patient, all the requirements of 29 CFR 525 (*i.e.*, proper certification by the employer, documentation that the patient has a disability that impairs his or her performance of the work in question, payment of the commensurate wage, etc.) must be met before the worker may be paid a subminimum wage.

**64c02 Patients in alcohol and drug abuse treatment programs.**

- (a) An alcoholic or drug addict who has been admitted to a work center frequently requires a drying out period before he or she is capable of performing work. This individual may be present in the work center during this period, primarily to be kept away from alcohol or drugs. The individual will not normally be performing significant productive work during the drying out period. Consequently, if an individual has been diagnosed as alcoholic or drug dependent, the WHD will not assert an employment relationship for the first 4 weeks (*i.e.*, 28 consecutive calendar days) of *residence* at the work center. An employment relationship will be asserted during the 28-day period, however, if the individual engages in activities that provide a consequential economic benefit to the work center (*see* FOH 10b34, 64c01(a)(1), and 64c01(a)(3)).
- (b) An employment relationship will not exist between residents and a residential care facility seeking to establish a family setting, per FOH 10b35, for treatment of individuals with drug or alcohol problems when:
  - (1) residents perform tasks that are ordinarily done on a daily basis in a private home, and are solely for the mutual benefit of the occupants of the home (institution);
  - (2) residents do not displace regular full-time employees by performing tasks that would ordinarily be done by full-time workers;
  - (3) enrollment in the treatment program is of relatively short duration, usually not longer than 1 year, as opposed to the long-term occupancy often associated with institutions caring for the mentally ill, the individuals with intellectual or developmental disabilities, the aged, or the terminally ill; and
  - (4) the institution is relatively small, houses a limited number of residents, and has no paid staff other than counselors.

**64c03 Prisoners.**

Questions regarding the FLSA employment status of prisoners who have committed criminal offenses, and are ordered to be confined to a mental hospital or other type of institution providing residential care require immediate consultation with the NO and the regional solicitor of Labor (RSOL). Generally, a prisoner and/or patient who performs work for the hospital or institution (*e.g.*, janitorial chores or kitchen duties) is not considered an employee for FLSA purposes. However, where a prisoner and/or patient is employed by the hospital or institution for commercial purposes, such as making products for sale, or is working for an outside commercial contractor that is covered by the act, the prisoner and/or patient may be considered an employee for FLSA purposes. Complaints raising this issue must be cleared by the NO, OP before taking any action.

**64c04**     **Unpaid volunteers.**

- (a) Members of service clubs and other charitable organizations frequently donate their time to help at not-for-profit organizations, such as work centers or hospitals. These individuals usually volunteer on a part-time basis and have no expectation of remuneration or employment. In these circumstances, no employment relationship would exist between the volunteer and the work center or hospital. The use of volunteers by a work center or hospital does not violate the terms and conditions of its subminimum wage certificate (*see* FOH 10b03(c)). If questions arise about the use of volunteers by for-profit organizations or employers, contact the NO, OP, DEPP, FMLA/OLS Branch.
- (b) Individuals who volunteer to help the work center or hospital meet production deadlines required by contract or subcontract work orders are not true volunteers, and an employment relationship exists when they are engaged in such activities.
- (c) Employees of a work center or hospital cannot volunteer to perform the same services they are normally employed and paid to perform. For example, a secretary cannot volunteer to respond to correspondence generated by a special fund-raising drive (*see* FOH 10b03(d)).
- (d) If workers with disabilities are allowed to volunteer their services, the following criteria must be met to protect them from exploitation:
  - (1) The worker with a disability must be legally competent to freely volunteer his or her services. A worker with a disability who is over 18 years of age is often his or her own guardian, but if not, the parent or guardian, as appropriate, must have approved such volunteer work. In such cases, the WHI must be certain that he or she is dealing with the actual guardian or custodial parent.
  - (2) The work performed must be substantially different from the work performed during duty hours.
  - (3) The work must be of the type that would be normally classified as volunteer work as described in FOH 10b03(c).
  - (4) The work must be performed outside normal duty hours.
- (e) WHIs should ask the employer during the initial conference about any individuals the firm considers to be volunteers rather than employees, and confirm the volunteer status.

**64c05**     **Veterans making artificial poppies.**

- (a) Traditionally, the U.S. Department of Veterans Affairs (VA) hospitals have allowed veterans with disabilities, who reside in its facilities, to make artificial poppies. In return for donations, members of the Veterans of Foreign Wars and the American Legion distribute these poppies to the general public.
- (b) The WHD takes no position on whether an employment relationship exists between the veterans and the veterans groups.
- (c) Complaints regarding this issue should be referred to the VA (*see* FOH 10b36).

**64c06**     **The Salvation Army.**

- (a)     The Salvation Army’s position is that individuals in its rehabilitation program, called beneficiaries, are not employees under the FLSA. Although the WHD may not agree with this position, do not initiate compliance actions until receiving clearance from both the regional administrator (RA) and the NO, OP, DEPP, FLSA/Child Labor Branch. Advise beneficiaries who complain that this WHD policy has no effect on their private action rights under section 16(b) of the FLSA.
- (b)     Investigations involving complaints filed by individuals, with or without disabilities, who the Salvation Army currently considers employees, and for whom FLSA coverage is not in question, shall be handled in the normal manner (*see* FOH 59a05).

**64c07**     **Workers injured in industry who are referred to work centers.**

- (a)     Work centers may be asked to provide vocational rehabilitation, evaluation, or training services for certain workers injured on the job. Such individuals may be referred to the work center by the state agency responsible for the worker’s compensation program, or by individual insurance carriers.
- (b)     If all of the following conditions are met, the WHD will *not* assert an employment relationship between the injured worker and the work center:
  - (1)     The injured individual has been referred to the work center by an insurance carrier or the responsible state agency.
  - (2)     The workshop and the referring party have reached an agreement as to the nature, content, and length of the program to be provided.
  - (3)     The broad objectives of the program are to assess the injured worker’s vocational interests and abilities, and return him or her to competitive (*i.e.*, non-sheltered) employment.
  - (4)     The injured worker receives payments from the insurance carrier or state agency during the program that at least equal his or her commensurate wage.
  - (5)     Any wage payments made by the work center would result in a reduction in the compensation payments from the state agency or insurance carrier.
  - (6)     The rehabilitation services provided are clearly in the injured worker’s interests, and participation in the services is required in order to receive compensation from the insurance carrier or state agency.

**64c08**     **Students with disabilities and workers with disabilities who are enrolled in individual rehabilitation programs.**

- (a)     Youths with disabilities often are especially disadvantaged in the workplace because their relative inexperience further complicates their ability to find and maintain meaningful employment. In recognition of the special needs of this population, the U.S. Departments of Labor and Education in 1992 jointly issued guidance regarding the employment relationship under the FLSA and community-based education programs for students with disabilities. For



these youths, community-based employment means placement in a worksite outside of their school setting. For example, the student may be placed in the mailroom of a corporation headquarters. Included in this guidance is the following statement of principle that summarizes the WHD’s enforcement posture and continued commitment to students with disabilities:

“The U.S. Departments of Labor and Education are committed to the continued development and implementation of individual education programs, in accordance with the Individuals with Disabilities Education Act (IDEA), that will facilitate the transition of students with disabilities from school to employment within their communities. This transition must take place under conditions that will not jeopardize the protections afforded by the Fair Labor Standards Act to program participants, employees, employers, or programs providing rehabilitation services to individuals with disabilities.”

- (b) In 1993, the U.S. Department of Labor (DOL) and the National Rehabilitation Facilities Coalition jointly issued similar guidance regarding the FLSA employment relationship and individuals with disabilities, not students in local public school systems, who are enrolled in individualized community-based rehabilitation programs. Enrollment in individualized community-based rehabilitation programs for these individuals means placement in a worksite away from the rehabilitation facility. This document also included the following statement of principle:

“The U.S. Department of Labor and community-based rehabilitation organizations are committed to the continued development and implementation of individual vocational rehabilitation programs that will facilitate the transition of persons with disabilities into employment within their communities. This transition must take place under conditions that will not jeopardize the protections afforded by the Fair Labor Standards Act to program participants, employees, employers, or other programs providing rehabilitation services to individuals with disabilities.”

- (c) In an effort to promote vocational training for workers with disabilities, the WHD will *not* assert an employment relationship between the worker with a disability, the rehabilitation facility or school, and/or the business where the worker has been placed when *all* of the seven following criteria are met (note: the criteria are the same for both students and non-students enrolled in vocational rehabilitation programs):
- (1) Participants are individuals with physical and/or mental disabilities for whom competitive employment at or above the minimum wage level is not immediately obtainable, and who, because of their disability, will need intensive ongoing support to perform in a work setting.
  - (2) Participation is for vocational exploration, assessment, or training in a community-based worksite under the general supervision of rehabilitation organization personnel, or in the case of a student with a disability, public school personnel.
  - (3) Community-based placements must be clearly defined components of individual rehabilitation programs developed and designed for the benefit of each individual.
    - a. Each student with a disability shall have an Individualized Education Program (IEP) that lists the needed transition services established for the

- exploration, assessment, training, or cooperative vocational education components.
- b. Each participant in a community-based rehabilitation organization program must have an Individual Plan for Employment (IPE) that includes a statement of needed transition services established for exploration, assessment, or training components. In the past, these plans were called Individualized Written Rehabilitation Plans.
- (4) Documentation will be provided to the WHD upon request that reflects that the individual is enrolled in the community-based placement program, that this enrollment is voluntary, and that there is no expectation of remuneration. However, the information contained in the IEP or IPE does not have to be disclosed to the WHD. The individual with a disability and, when appropriate, the parent or guardian of each individual must be fully informed of the IEP or IPE and the community-based placement component of the plan.
- (5) The activities of the individuals with disabilities (*i.e.*, participants) at the community-based placement site do not result in an immediate advantage to the business. Factors that would indicate the business is advantaged by activities of the individual include:
- a. Displacement of regular employees
  - b. Vacant positions have been filled with participants rather than regular employees
  - c. Regular employees have been relieved of assigned duties
  - d. Participants are performing services that, although not ordinarily performed by employees, clearly are of benefit to the business
  - e. Participants are under continued and direct supervision of employees of the business rather than representatives of the rehabilitation facility or school
  - f. Placements are made to accommodate the labor needs of the business rather than according to the requirements of the individual's IEP or IPE
  - g. The IEP or IPE does not specifically limit the time spent by the participant at any one site, or in any clearly distinguishable job classification
- (6) While the existence of an employment relationship will not be determined exclusively on the basis of the number of hours spent in each activity, as a general rule, an employment relationship is presumed not to exist when each of the three components does not exceed the following limitations:
- a. Vocational explorations: 5 hours per job experienced
  - b. Vocational assessment: 90 hours per job experienced
  - c. Vocational training: 120 hours per job experienced

In the case of students, these limitations apply during any one school year.

- (7) Individuals are not entitled to employment at the business at the conclusion of the IEP or IPE. However, if an individual becomes an employee, he or she cannot be considered a trainee at that particular community-based placement unless in a different, clearly distinguishable occupation.
- (d) An employment relationship will exist unless all of the criteria described in FOH 64c08(c) are met. If an employment relationship is found to exist, the employer will be held responsible for full compliance with the FLSA.
- (e) Business and rehabilitation organizations may, at any time, consider participants to be employees and pay them the full minimum wage required by section 6(a) or the SCA. Properly certified employers may also pay subminimum wages to participants who are disabled for the work being performed. Employees under age 20 may be paid the youth opportunity wage as provided by section 6(g) of the FLSA rather than a subminimum wage. The youth opportunity wage may never be the prevailing wage upon which a commensurate wage is based.

**64c09 Joint employment.**

- (a) When a worker with a disability is placed in competitive employment by a rehabilitation facility, and the worker is supervised by a job coach supplied by the rehabilitation facility, the worker is jointly employed by the rehabilitation facility and the establishment where he or she is placed. The two are considered joint employers even if the amount of supervision provided by the facility's job coach is as little as 2 hours per pay period, and the establishment takes responsibility for paying the worker. A joint employment relationship is asserted in this circumstance because, by retaining some degree of control or supervision of the worker, the rehabilitation facility is acting in the interest of the establishment or the other employer (*see* 29 CFR 520.20(h) and 29 CFR 791.2(b)(2)).
- (b) As with all joint employment situations, either employer is responsible for FLSA compliance and can be held liable for back wages (*see* FOH 64h00). Requests for payment of back wages and process changes needed to achieve compliance, however, shall be directed first to the rehabilitation facility and/or agency. If this initial request secures the desired results, there is normally no need to contact the business entity jointly employing the worker with a disability.



**64d CERTIFICATES****64d00 Introduction.**

- (a) In order to pay a subminimum wage to a worker with a disability, an employer must first obtain a certificate from the WHD. All section 14(c) certificates are now processed and issued by the Section 14(c) Certification Team (Certification Team) located in the Chicago Regional Office (RO). Employers apply for subminimum wage certificates using WH-226-MIS: Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (WH-226-MIS) and WH-226A: Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (WH-226A). The certificate itself is issued on WH-228-MIS. An example of the certificate (*see* WH-228-MIS) is included at the end of this chapter (*see* FOH 64k01).
- (b) These certificates authorize the employment of workers with disabilities in accordance with the requirements of 29 CFR 525. They remain in effect for the period indicated on the certificate or until withdrawn or revoked, *provided* the employer maintains compliance with all applicable provisions of the FLSA.
- (c) The certification process is one tool the DOL uses to help employers achieve and maintain compliance with section 14(c). But because the process constitutes a review of only a limited amount of employer-provided information, the certificate is not a statement of compliance. Issuance of a certificate will not convey a good faith defense to employers should violations of the FLSA, the SCA, or the PCA occur, as certificates may be revoked retroactively as of the date of the violation(s). In the past, some employers have mistakenly thought that because the WHD had issued them a certificate, the WHD was acknowledging their compliance. In order to avoid future misunderstandings, certificates are now issued with such a disclaimer.
- (d) The regulations permit the WHD to grant employers temporary authority to pay subminimum wages under certain circumstances to workers with disabilities pursuant to vocational rehabilitation programs of the VA or a vocational rehabilitation program administered by a state agency (*see* 29 CFR 525.8).
- (e) The certificates are issued on an establishment basis to three kinds of facilities: work centers (certificate will read “Work Center”), hospitals or residential care facilities for the employment of patient workers (certificate will read “Patient Worker”), and business establishments for the employment of workers with disabilities (certificate will read “Business Establishment” or “School Work Experience Program” (SWEP)). The right-hand portion of each certificate will indicate the kind of facility to which it was issued.
- (1) *Work center certificates*
- Work centers, formerly referred to as SWSs, historically have provided rehabilitation services, day treatment, training, and employment opportunities at their facilities to individuals with disabilities.
- a. Although the enterprise need only submit one application, the WHD will issue separate certificates for an employer’s main facility and all branch facilities.

- b. Separate certificates are not issued for individual worksites where employees with disabilities may perform work but where the work center maintains no other presence (*e.g.*, military commissaries, restrooms at National Parks, lawns that are being maintained, etc.). Work center certificates are portable to these job sites.
- c. Work center certificates also cover the employment of workers with disabilities who remain on the payroll and under the supervision of the work center, but are placed at a competitive worksite or at a business establishment. These locations are sometimes referred to as enclave or supported employment (SE) worksites. In these instances, the enclave worksite employer does not have to obtain his or her own certificate.

(2) *Patient worker certificates*

Hospitals and residential care facilities (institutions) frequently use their patients to perform janitorial, grounds maintenance, food service, and other functions that are of consequential economic benefit to the institution. Certificates are issued to these facilities to cover patients who have disabilities that are employed in this manner regardless of whether or not the patient resides at the institution. If the institution also operates a work center, it must apply for an additional certificate for the work center. If the institution places patients at worksites in business establishments in the community, it must either obtain a work center certificate or ensure that the business has a certificate authorizing the payment of subminimum wages to workers with disabilities.

(3) *Business establishment certificates*

Employers in private industry who choose to employ workers with disabilities at subminimum wages must also obtain a certificate.

- a. If the employer is a multi-establishment enterprise, the WHD's policy and procedures require that certificates be obtained for *each* establishment in which workers with disabilities will be employed. However, if an individual with a disability is placed at a business by a work center, supervised by the work center, and carried on the work center's payroll, the business need not obtain a certificate. This arrangement is sometimes called an SE or an enclave worksite. In these situations, it is the responsibility of the work center to obtain the certificate.
- b. The "Business Establishment" box on WH-226: Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (WH-226) is also the one used by schools with SWEP. These programs place students with disabilities at worksites in the community. Jobs involved and the conditions of employment must comply with the child labor standards when the student is less than 18 years of age.
  - 1. When schools apply for certification, they must list each establishment in which a student will be placed. This listing will be found in item three on WH-226. An attachment may be required if there are numerous locations.

2. The school must also list each student participating in the program on the supplemental information form (*see* WH-226A). The school will be issued a certificate for each establishment listed on the application, and it is the school's responsibility to provide a copy of the certificate to each business establishment and keep the original on file at the school.
- c. Employers seeking temporary authority to employ workers with disabilities referred to them by a vocational rehabilitation program of the VA or a state vocational rehabilitation program are also issued Business Establishment (Special Worker) certificates.
- (f) The certificates do not establish specific subminimum wage rates. They do, however, require the payment of at least commensurate wage rates (explained in FOH 64g05) to all workers who have disabilities for the work being performed (*see* FOH 64g00). The certificates apply to all work covered under the FLSA, the SCA, and the PCA.
  - (g) Applications for subminimum wage certificates (*see* WH-226 and WH-226A) may be obtained from any WHD RO and the NO, OP, DEPP, FMLA/OLS Branch. They may also be viewed on, and downloaded from, the WHD homepage on the internet at [www.dol.gov/dol/esa/public/forms/whd/index.htm](http://www.dol.gov/dol/esa/public/forms/whd/index.htm).
  - (h) On 04/01/1996, the section 14(c) subminimum wage certification process was centralized in the Certification Team of the Chicago RO. The Certification Team processes all applications for section 14(c) certification and issues or denies certificates under this program. Employers shall mail completed applications to:

U.S. Department of Labor  
Wage and Hour Division  
230 South Dearborn Street, Room 524  
Chicago, Illinois 60604-1591

- (1) The Certification Team will process each application and, as appropriate, issue or deny a certificate, in accordance with the regulations and established guidelines.
- (2) Employer questions regarding the status of specific applications or renewals should be referred to the Certification Team located in the Chicago RO. The name and telephone number of the Certification Team Compliance Specialist that will be processing the employer's certificate is printed on the renewal application the Certification Team mailed to the employer. This same information is also printed on the certificate when it is issued.
- (3) Questions regarding compliance, enforcement, or any other aspect of section 14(c) should be handled locally by the district office (DO) or the regional enforcement coordinator: section 14.
- (4) The Certification Team has divided the 50 states into 5 groups. When requesting copies of applications, certificates, or prior history, the WHI should contact the appropriate Compliance Specialist by phone or fax at (312) 596-7207. The appropriate phone numbers are listed below:

- a. (312) 596-7199: Arizona, Delaware, Idaho, Indiana, Maine, Montana, Nebraska, North Dakota, Tennessee, Texas, Vermont, Virginia, Washington, and Wyoming.
- b. (312) 596-7201: California, Connecticut, Hawaii, Kentucky, Louisiana, Massachusetts, Nevada, Oklahoma, Rhode Island, South Dakota, and West Virginia.
- c. (312) 596-7200: Alabama, Arkansas, Maryland, Michigan, Missouri, North Carolina, New Hampshire, South Carolina, Utah, and Wisconsin.
- d. (312) 596-7202: Alaska, Georgia, Minnesota, Mississippi, New Mexico, New York, Ohio, and Oregon.
- e. (312) 596-7198: Colorado, District of Columbia, Florida, Guam, Illinois, Iowa, Kansas, New Jersey, Pennsylvania, Puerto Rico, and the Virgin Islands.

**64d01 Effective dates of subminimum wage certificates.**

- (a) The effective date of the certificate is stated below the employer's name and address. Work Center and Patient Worker certificates are issued for 2-year periods. Business Establishment (Special Worker) certificates, including SE and SWEP certificates, are issued for a 1-year period.
- (b) If an application for renewal has been properly and timely filed, the existing special subminimum certificate will remain in effect until the application for renewal has been granted or denied (*see* 29 CFR 525.13(b)).

**64d02 Certificates involving workers with disabilities employed as homeworkers.**

- (a) If an employer is an organization or institution carrying out a recognized program of rehabilitation for workers with disabilities and holds a certificate authorizing the payment of subminimum wages under section 14(c), that employer is not required to obtain a certificate under 29 CFR 530 to employ these workers with disabilities as industrial homeworkers (*see* 29 CFR 525.15(a)).
- (b) **Handbooks**
  - (1) Workers with disabilities who are employed by a nonprofit rehabilitation facility and working in or about a home, apartment, tenement, or room in a residential establishment are not required to maintain homeworkeer handbooks (*see* 29 CFR 525.16(e)).
  - (2) Homeworkeer handbooks must be maintained for homeworkers employed by *for-profit* employers under a section 14(c) certificate. These handbooks may be obtained through the Wage and Hour Division, Office of Policy, Division of Enforcement Policy and Procedures, FLSA/Child Labor Branch, Room S3510, 200 Constitution Avenue, NW, Washington, DC 20210.



- (c) Employers of industrial homeworkers receiving subminimum wages authorized by a certificate issued under section 14(c) may satisfy the posting requirements by providing the poster directly to the employees or, where appropriate, to the parents or guardians of the homeworkers with disabilities.

**64d03 Certificate revocation and denial of renewal applications.**

- (a) A subminimum wage certificate may be revoked, or an application to renew an existing certificate may be denied, for the reasons cited below (*see* 29 CFR 525.17). Should back wages be due workers paid subminimum wages under the provisions of the certificate, those back wages are due from the date of revocation.
  - (1) It is found that false statements were made or facts were misrepresented in obtaining the certificate or in permitting a worker with a disability to be employed under a certificate. If this is the case, the certificate may be revoked retroactively to the date of issuance.
  - (2) It is found that any of the provisions of the FLSA or the terms of the certificate have been violated. In this case, the certificate may be revoked as of the date of the violation (*see* 29 CFR 525.17(a)(2)).
  - (3) It is found that the certificate is no longer needed to prevent the curtailment of employment opportunities for workers with disabilities. In this case, the certificate may be revoked as of the date of the revocation notice.
- (b) Only the Administrator of the WHD (Administrator) or the RA for the Midwest Region may revoke a certificate or deny the issuance of a renewal certificate. The process to revoke a certificate to pay subminimum wages may not begin without the concurrence of the branch chief of the NO's OP, DEPP, FMLA/OLS Branch and must follow the procedures for revoking a certificate found in 29 CFR 525.17(b) and 29 CFR 525.18.
- (c) The procedures for the denial of renewal applications may be found in 29 CFR 525.13. The denial of a renewal application may be *initiated* by a member of the Certification Team or a regional enforcement coordinator: section 14. The Certification Team must obtain the input of the appropriate regional enforcement coordinator(s): section 14 and the concurrence of the RA for the Midwest Region before an employer is formally advised that his or her request for renewal has been denied.



**64e SECTION 14(c) INVESTIGATION PROCEDURES AND CONSIDERATIONS****64e00 General.**

- (a) Standard investigative procedures should be followed in all investigations of CRPs, hospitals or institutions, and business establishments employing workers with disabilities, except where modified or superseded by instructions in this chapter. Unless stated otherwise below, the following instructions apply equally to investigations of rehabilitation facilities, hospitals or institutions, and business establishments.
- (b) The objective of a section 14(c) investigation is to determine if:
  - (1) The employer is in compliance with the provisions of the laws enforced by the WHD
  - (2) The employees paid subminimum wages have disabilities for the work performed
  - (3) The workers with disabilities are paid commensurate wages
  - (4) The employer is in compliance with the terms and conditions of the subminimum wage certificate
  - (5) The employer requires any assistance to ensure continued compliance with the provisions of the FLSA
- (c) Experience has demonstrated that the most common violations found during section 14(c) investigations include:
  - (1) Failure to use proper sources when conducting a prevailing wage survey
  - (2) Failure to properly document the prevailing wage survey and maintain that documentation
  - (3) Failure to obtain the *experienced* rate when conducting prevailing wage surveys
  - (4) Failure to determine prevailing wage rates at a minimum of once a year
  - (5) Failure to adjust prevailing wage rates after a minimum wage increase
  - (6) Failure to adjust piece rates and hourly rates as a result of adjustments and/or changes to the prevailing wage
  - (7) Failure to evaluate hourly paid workers with disabilities on a timely basis and/or failure to timely adjust the hourly rates after the employee is evaluated
  - (8) Payment of a blanket training wage or training rate rather than basing pay on the commensurate wage (*see* FOH 64g07(a)(2)b.)
  - (9) Using behavioral standards when conducting quantity and/or quality evaluations of hourly paid workers (*see* FOH 64g05(d))

- (10) Rounding errors in time studies and when computing the commensurate wages (*e.g.*, where the piece rate multiplied by the standard units per hour fails to yield at least the prevailing wage rate)
- (11) Inadequate time studies, such as failure to include irregular elements (*e.g.*, equipment failure or depletion of needed supplies)
- (12) Failure to ensure the worker has a disability for the work being performed, or failure to maintain and/or provide documentation to support that the worker has a disability for the work he or she performs
- (13) Failure to count all hours worked
- (14) Failure to pay full fringe benefits for work on SCA contracts

**64e01 Hours worked issues in section 14(c) investigations.**

**(a) Rehabilitative services**

Time spent by workers with disabilities in rehabilitative services is not hours worked provided the services are not primarily for the purpose of increasing job productivity. This is the DOL's position whether the services are given to a group of workers or individual workers, and whether given at scheduled times or irregular intervals. The burden of identifying and segregating on the time records the time spent in rehabilitative services from hours worked rests with the facility. Some examples of rehabilitative services are counseling, psychological testing, mobility training, medical treatments, personal care, physical therapy, occupational therapy, recreation, and physical exercise.

**(b) Downtime**

- (1) Downtime refers to compensable time when the worker with a disability is on the job but is not producing because of factors not within his or her control, such as lack of work, equipment breakdowns, etc. (*see* 29 CFR 785.14 regarding waiting time and the worker). Workers with disabilities, including those paid piece rates, are required to be paid for downtime at a rate equal to their average hourly earnings during the most representative period, not to exceed a quarter. Employers must be consistent in the method used when computing the employee's average hourly earnings.
- (2) As a practical matter, workers with disabilities are often unable to leave the facility because of special transportation arrangements or other reasons unique to their condition. The facility will often provide rehabilitation services to workers with disabilities during periods of extended downtime, and such time need not be considered compensable so long as the services provided are not primarily for the purpose of increasing job productivity; such time is clearly identified, recorded, and segregated on time records; and the services are provided in an area away from the production area.

**(c) Work samples and/or simulations**

Work samples or simulations are activities that are structured to resemble the work performed in the facility but are performed away from the normal production area. These activities do

not yield a product used to fulfill any of the facility's contracts, and the facility does not derive any economic benefit from the product. They are supervised by non-production personnel and are a specific part of a well-defined program of rehabilitation.

- (1) In 1985, the Advisory Committee on SWSs asked the DOL to review its position regarding the criteria used in determining whether work simulation constituted hours worked under the FLSA. As a result of this review, the DOL determined that work simulation performed by workers with disabilities in work centers was predominately for the benefit of the workers with disabilities and that employers derived no immediate advantage from this activity.
- (2) Accordingly, the DOL's position since 1985 has been that work simulation performed by workers with disabilities receiving subminimum wage under section 14(c) in work centers is not hours worked and compensation need not be paid for this activity, *provided* none of the material, goods, or services produced enters into the stream of commerce by being intermingled with the normal production of the employer. Typically, such materials would be discarded or recycled for future use in work simulation. This is the DOL's position even if the purpose of the simulated work is to increase the productivity of the worker with disabilities.

**(d) Transportation and/or travel time**

The time spent by workers with disabilities being transported to and from the worksite and their homes, including group homes and dormitories, by the employer at the beginning and end of the day is not hours worked. Such transportation retains the characteristic of normal home to work travel. Additionally, employers may treat the transportation as an other facility for the purposes of section 3(m) (*see* 29 CFR 531.32(a) and FOH 64e02).

- (1) When workers with disabilities report to a centralized pick-up spot to get a ride in their facility's vehicle to a remote job site that may not be readily accessible by public transportation, the DOL's position is that this transportation retains the characteristic of normal home to work travel. Hence, it does not constitute hours worked so long as all of the following conditions are met: the workers with disabilities do not perform any work at the pick-up spot, they do not engage in any task that could be considered an integral part of their principal activity, and they retain the option to transport themselves to the job site.
- (2) At times, because of their disabilities, the workers' option to transport themselves to the job site may be only theoretical. For example, the worker with a disability may not be eligible for a driver's license or his or her guardian may be unable to provide transportation. The fact that the transportation option is only theoretical does not change the DOL's position that such travel is not hours worked.
- (3) Any time spent in transportation provided by the facility between job sites during the course of the workday *is* hours worked (*see* 29 CFR 785.38), and the employee shall be paid a wage rate that is at least equal to his or her average hourly earnings during the most recently completed representative period, not to exceed a quarter. Employers must be consistent in the method used when computing the employee's average hourly earnings.

(e) **Volunteers**

It is important, during the initial conference, to identify any individuals, including workers with disabilities, that the firm considers to be volunteers during any part of the work day, and verify the volunteer status (*see* FOH 64c04(e)).

**64e02** **Section 3(m) considerations.**

- (a) If a facility deducts the cost of board and lodging from the wages of workers with disabilities, the WHI should follow the instructions in 29 CFR 531 and FOH 30c to ensure the deduction represents the fair value or reasonable cost of the board, lodging, or other facility. Note: *see* FOH 64e02(d) for special instructions regarding deductions from the wages earned by patient workers.
- (b) Employers may incur costs directly related to providing room and board to workers with disabilities, and these costs *could* be credited toward wage obligations to the extent the costs are incurred to the benefit of the workers with disabilities and would not otherwise be incurred by the employer.
- (1) To convert the annual cost of board, lodging, or another facility into the average equivalent weekly cost per worker, divide the reasonable annual cost of items provided by the organization, consistent with the requirements of 29 CFR 531, by 52 weeks and then by the total number of workers with disabilities who received the benefit of these items.
- (2) The following are examples of costs a facility might incur that could be directly related to providing room and board and *could* be credited toward wage obligations to the extent the costs are incurred to the benefit of the workers with disabilities and would not otherwise be incurred by the employer:
- a. Cost to the facility of renting dormitories, kitchens, and recreational areas
  - b. Cost of depreciation, including the depreciation of furniture and other equipment used by the worker with a disability, if the buildings comprising the facility are owned by the facility
  - c. Laundry costs
  - d. Food costs
  - e. Cost of fire and similar insurance
  - f. Utility costs
  - g. Salaries paid to employees whose jobs are an integral part of providing the room and board (*e.g.*, cooks, janitors, kitchen helpers, and maintenance personnel)
  - h. Cost to the employer of providing home to work transportation to the client (*see* FOH 64e01(d))

- (3) Two examples will illustrate the point that the costs must be incurred for the benefit of the workers with disabilities and not otherwise incurred by the employer:
- a. A work center employs a cook to prepare meals for the workers with disabilities. The cook, however, spends 25 percent of his or her time preparing meals for individuals who do not have disabilities that are receiving job training at the facility. The work center may only take 75 percent of the cook's compensation as a credit toward wages due workers with disabilities.
  - b. A worker center pays mortgage interest on a building in which the workers with disabilities dine. If this space would otherwise be empty or used for other purposes by the work center, no portion of the mortgage interest could be considered a reasonable cost of furnishing board and lodging.
- (c) If the worker with a disability or a third party has made a contribution toward the cost of the board, lodging, or another facility, the employer may not take credit for that contribution when determining the fair value or reasonable cost. The following examples are *not wage payments* and may not be credited toward wage obligations:
- (1) The value of employees' food stamps that are used to purchase food for the facility when the employer calculates the reasonable cost of board
  - (2) Donated clothing worn by workers with disabilities unless the employer incurs a cost in making the clothes wearable
  - (3) Stipends or living allowances paid to a worker with a disability by a third-party rehabilitation organization or a government agency
  - (4) Reimbursement for transportation to and from home (dormitory or group home) and the job site (*e.g.*, work center) provided by some other organization or governmental agency (*e.g.*, federal, state, or local)
  - (5) Employer provided transportation between job sites (not normal home to work travel)
- (d) Hospitals and institutions may not make deductions from patient workers' commensurate wages to cover the cost of board, lodging, and other services, unless (and to the extent) such deductions are permitted by applicable federal or state law, and the deductions are made on the same basis and collected from non-working patients as well (*see* 29 CFR 525.5(b)).





**64f INITIAL INVESTIGATIVE ACTIVITIES****64f00 Preparation for investigation.**

- (a) Because some WHIs are not assigned section 14(c) investigations on a regular basis, a review of FOH 64 and 29 CFR 525 is recommended before any action is taken. Because the WHI will encounter some terms that are unique to investigations of section 14 employers, a glossary is provided at the back of this chapter.
- (b) The regional enforcement coordinator: section 14 may be contacted, following established procedures, for guidance during the conducting of investigations under section 14(c).
- (c) Unless the matter was referred to the DO by the Certification Team, the WHI must contact the Certification Team as soon as it becomes apparent that an investigation involves compliance with section 14(c).
  - (1) These contacts are required for several reasons:
    - a. Compliance impacts the certification process. Certificates should not be issued or renewed during an open investigation where a formal determination of compliance is being made.
    - b. The Certification Team conducts its own compliance reviews of the applications for certification and follows up if there are indications of violations. Contact with the Certification Team will reduce duplication of enforcement efforts.
    - c. Much like the main office-district office (MODO), the Certification Team possesses both certification and compliance history information concerning the firm that may not be available from any other sources (note: this contact does *not* eliminate or replace the MODO contacts required by FOH 61). Request the Certification Team to send the following documents:
      - 1. A copy of the subminimum wage certificate(s) applicable to the 2-year investigative period
      - 2. A copy of the complete section 14(c) application with attachments. The application (*see* WH-226 and WH-226A) requires the employer to submit prevailing wage rate survey data, hourly commensurate wage evaluation forms, information on piece rates paid, piece rate productivity, and a description of the piece work performed. Thus, the application is a useful tool in assessing the employer's status of compliance and should be thoroughly reviewed prior to the opening conference.
      - 3. A copy of all information concerning any prior investigation history that office may hold
  - (2) The Certification Team shall be used as a resource to provide information about an employer's certification history. The Certification Team is *not* to be used for general technical assistance regarding the conducting of investigations or the enforcement of

section 14(c). The regional enforcement coordinator: section 14 will provide this assistance.

- (3) Upon completion of the investigation, copies of the narrative report, WH-51: WHISARD Compliance Action Report (WH-51), and any Letter of Findings will be forwarded to the appropriate regional enforcement coordinator: section 14 and the Certification Team in the Chicago RO (*see* FOH 64h04).

#### **64f01 Beginning the investigation.**

- (a) For investigations involving work centers or patient workers, the WHI shall send an appointment letter to the employer prior to visiting the establishment to ensure the presence of the executive director or his or her representative during the investigation. Unannounced visits prior to the initiation of an investigation should generally occur only in unusual, emergency-type situations, such as after receiving allegations of minors being placed at risk because their employment violates the child labor provisions.
- (b) The appointment letter shall specify the documents and records the WHI will need for reviewing and/or copying, and shall advise the employer that the WHI will be requesting a tour of the facility.
- (c) Samples of section 14(c) Appointment Letters are included at the end of this FOH chapter. The type of letter the WHI sends will depend on such factors as whether the employer has been investigated before, size of the establishment, etc. Information the WHI will need to review, and in some cases, copy for the investigation file, include:
  - (1) Names and addresses of the president and board of directors and/or corporate officials
  - (2) Copies of the financial statements for past 3 years. These documents are useful when determining an establishment's primary revenue source for the purpose of establishing enterprise coverage under section 3(s)(1)(B). This information could also support a facility's request for an installment payment plan should back wages be due. If the documents are bulky, the WHI may wish to retain only the income and expense statements in cases that are closed and/or settled administratively.
  - (3) Payroll and time records, for both the staff and clients, for the standard investigative period. This will include the most recently completed payroll for both staff and clients to be used as a profile workweek.
  - (4) A list of all staff members showing the name, hourly rate or salary, and a descriptive job title
  - (5) Dates of birth of all employees under 19 years of age who worked during the last 24 months
  - (6) All Form I-9: Employment Eligibility Verification (Form I-9) for current employees hired after 11/01/1986. *WHIs will request this information only in targeted (i.e., non-complaint) compliance actions.*
  - (7) The employer's federal identification number

- (8) Contract information for the standard investigative period to help establish individual coverage and assist in evaluating the accuracy of commensurate wages:
- a. For *production* contracts, obtain:
    - 1. Name and address of customer
    - 2. Geographic source of the raw materials or component parts
    - 3. Final geographic destinations of goods produced
  - b. For SCA contracts, obtain:
    - 1. Name and address of contractor, including name of prime contractor if work is being performed by a subcontractor
    - 2. Contracting agency's name and address
    - 3. Contracting officer's name and phone number
    - 4. Brief description of work
    - 5. Number of workers employed on the contract
    - 6. Contract award date and period of contract performance
    - 7. Dollar amount of contract
    - 8. Copy of any applicable SCA wage determinations
- (9) Documents substantiating the type and severity of the workers' disabilities. Acceptable documents would include a physical examination by a medical doctor or doctor of osteopathy, or the results of psychological testing by a Master's level psychologist, *and* staff notes on how the disability affects productivity.
- a. The documentation should be sufficiently current to accurately reflect the nature and status of the disability. In some cases, older documentation may not reflect changes in the severity of the disability (*i.e.*, increases or decreases) in those circumstances where this can change.
  - b. WHIs, following established procedures, should consult the regional enforcement coordinator: section 14 before challenging the documentation solely on the basis of the age of the documentation.
- (10) Productivity records and time studies documenting standards used to establish piece rates and hourly commensurate wage rates
- (11) Evaluations and documentation used to support rates paid to hourly paid workers with disabilities
- (12) Prevailing wage survey data (*see* 29 CFR 525.10(g) for a review of what survey data should include)

- (13) For patient worker investigations, the WHI must also ask whether the institution is for-profit or not-for-profit, public or private, primary disability group served, total number of patients in the institution at the time of the investigation, and number of patients who are also employees of the institution.

**64f02 Visit to the establishment.**

- (a) Shortly after the initial conference, especially when the employer is a work center, the WHI should tour the facility with the director or other responsible official, in an effort to determine the following:

- (1) The apparent functioning level of the workers with disabilities and whether any of them appear not to have disabilities for the work they are doing. Request the names of workers who do not appear to have disabilities for the work being performed at the time of the tour. A review of these workers' disability documentation may be necessary.
- (2) The production methods used on major contracts. This will help identify which jobs or job elements are to be time studied. Find answers to the following:
  - a. Are employees compensated on an hourly or piece rate basis? If paid a piece rate, who sets up the work area, replenishes the supplies, and counts the units produced? If done by the worker, is the time spent in these activities incorporated into the time study used to establish the piece rate? Failure to include all tasks in the time study will result in an artificially high production standard.
  - b. Are there significant amounts of downtime as the result of changing work assignments, equipment breakage, or other reasons? How is this time recorded and paid for?
  - c. Is the work of a strenuous nature that would fatigue the workers over the course of the workday, causing a reduction in their productivity and earnings? Do the workers take breaks or rest periods, and if so, how is this time treated?
  - d. Are minors employed, and if so, are they employed in compliance with the child labor laws? Note: Child Labor Reg. 3 occupations standards prohibit minors under 16 from employment in work rooms where goods are manufactured or processed, activities often performed in work centers.

- (b) **Records review**

During the initial conference, ensure that the documents requested in the appointment letter are available. Conduct a detailed review of the records after completing the initial tour. Copies or transcriptions of time and payroll records should be included in the case file as needed. When reviewing payroll and time records, the WHI should follow standard investigative procedures outlined in FOH 5200(b).

- (1) Review documentation of the time studies to identify a sample number of job or job element standards to be verified during the investigation. Request copies of the time

studies to be verified and include a sample of them in the case file (*see* FOH 64g04 for methods of work measurement).

- (2) Review disability documentation to ensure that the workers have disabilities for the work performed. Begin with a sample, but expand the review as necessary if problems are found.

(c) **Interviews**

(1) *Workers with disabilities*

- a. Formal interview statements may be taken from workers with disabilities in order to determine compliance. Prior to interviewing workers with intellectual or developmental disabilities as the primary disability, WHIs should obtain permission from the appropriate party, most often the workers' parent or guardian, if there is one. Often the parent or guardian possesses sufficient knowledge of the worker's employment situation to make a determination regarding compliance.
- b. When interviewing a worker with a disability who is employed in a competitive industry, the WHI must take special care not to single out that individual from the rest of the employees, or question other employees about the nature of the disability of the worker who is receiving a subminimum wage.

(2) *Staff*

Interviews of staff can also help to determine the adequacy and accuracy of records, substantiate or disprove alleged violations, and discover other violations with respect to both workers who do not have disabilities and workers with disabilities. The WHI should attempt to interview floor supervisors of workers with disabilities.

- a. Ask the floor supervisor to describe how worker production is recorded and who records that production.
- b. It is recommended that the WHI select at least two workers with disabilities from the profile workweek and *interview the floor supervisor* who oversees their work.
  1. Using standard interview techniques, reconstruct these employees' starting and stopping times, average number of hours worked per day and per week, average units produced per hour for piece rate workers, and average earnings per day and per week.
  2. Compare the information obtained from the interviews with the information reflected on payroll and time records.
  3. Verify the adequacy and accuracy of the prevailing wage survey. If the supervisor conducts the prevailing wage surveys, request a brief explanation of how he or she conducts the surveys to determine if done correctly.

4. If there has been a minimum wage change during the investigative period, ask if the prevailing wage was verified after the minimum wage change and if piece rates and hourly rates were changed accordingly.
  5. The supervisor should be questioned about such things as downtime, restocking of supplies, and how workers are paid during these activities.
  6. Standard interview questions asked employees during an investigation should also be asked of the supervisor.
- (d) Conduct or observe confirming time studies. Follow these steps to conduct a confirming time study:
- (1) Obtain from the facility a list of individuals to be studied who are familiar with the work and who perform within an average range.
  - (2) Study and observe the steps listed on the facility's time study documentation and compare them with those in the confirming time study to ensure that all steps required to do the job were included in the original time study.
  - (3) Conduct or observe the confirming time study for a length of time long enough to generate a work pace that can be maintained throughout the workday.
  - (4) Compare the results of the confirming time study with the standards established by the facility's original time study. Generally, if the variance is 10 percent or more, the reason for the difference should be investigated. The WHI will particularly suspect the facility's standards if all the confirming time studies indicate that the employees need additional time to complete a given task.
  - (5) Check the contracts that were not selected for confirming time studies to ensure that time study documents, prevailing wage data, and commensurate wage rate calculations reflect compliance. If errors or inconsistencies are found in these documents, expand the number of confirming time studies.
  - (6) Do not require a facility to time study a new contract that involves identical tasks already time studied, or very small jobs in which a time study would consume all the materials required by the contract.

**64g ISSUES REQUIRING SPECIAL ATTENTION.****64g00 Disabled for the work to be performed.**

- (a) Before the WHI can determine compliance, it must be determined whether the worker's disability(s) actually renders him or her to be disabled for the work being performed. If the disability does not affect his or her accomplishment of the specific tasks performed, the employee is due the full applicable section 6(a) minimum wage (*see* FOH 64a01). These determinations are made by observing the workers and spot checking the disability records requested during the initial conference. The employer's records should include documentation that supports the nature of each worker's disability. Disabilities that are not visibly obvious must be supported by medical or psychiatric reports, or psychological tests.
- (b) In some instances, the employer may not have records documenting a worker's disability because the employee was referred by another agency or facility, and the referral agency or facility, out of a concern for the worker's right to privacy, did not provide the employer with the records. In the case of such a referral, the employer is not required to maintain documents identifying the worker's disability. The referral agency, however, should maintain such documentation and provide it to the WHI for inspection (*see* 29 CFR 525.16(a)).
- (1) If the referral agency denies the WHI's access to records identifying a worker's disability, attempt to obtain the release of the documents by assuring the agency that DOL's policy prohibits the disclosure of disability information. Also, explain that third-party attempts to gain access to disability information are exempt from disclosure under the Freedom of Information Act.
- (2) If, for any reason, the referral agency still refuses to provide the WHI with documentation identifying a disability, and the disability is not readily apparent, the employer will be given the opportunity to obtain and provide such documentation. If the employer fails to do so within a reasonable amount of time, generally no more than 30 days, the employer shall be advised that the payment of the subminimum wage to those workers for whom documentation of the disabilities is not available constitutes a violation of section 6 of the FLSA. The regional enforcement coordinator: section 14 and the NO, OP, DEPP, FMLA/OLS Branch shall be consulted immediately concerning the computation of back wages and the possible revocation of the employer's certificate.

**64g01 Proper certification.**

- (a) The WHI must always check that the employer does in fact have a certificate to employ workers with disabilities at subminimum wages and that the certificate is valid. The Certification Team will assist WHIs in determining if certificates are valid and whether renewal applications were timely filed.
- (1) Although section 14(c) certificates are issued with a specific expiration date, there are situations when an employer's authority to pay subminimum wages extends beyond the date on the certificate. For example, an employer's authority to pay subminimum wages would continue if a timely renewal application was filed prior to the certificate expiration date but a new certificate had not yet been issued. The same is true when revocation action has been commenced by the WHD but the firm has been provided an opportunity to demonstrate compliance, and the period to demonstrate that

compliance goes beyond the expiration date of the certificate. Revocation of the authority to pay subminimum wages is accomplished by a written notification (*see* 29 CFR 525.13, 29 CFR 525.17, 29 CFR 525.18, and FOH 64d03(c)).

- (2) As mentioned above, if the expiration date on the certificate has passed, but the employer's renewal application was properly and timely filed (*i.e.*, postmarked before the expiration date), the employer's authority to pay the subminimum wages remains in effect until the Certification Team in the Chicago RO either grants or denies the new certificate (*see* 29 CFR 525.13).
  - (3) WHIs shall check with the regional enforcement coordinator: section 14, through appropriate channels, before computing and requesting payment of back wages due workers with disabilities solely because the employer's certificate has expired.
- (b) If a hospital or institution has a certificate authorizing the employment of patient workers, the WHI must verify that the workers with disabilities do, in fact, receive treatment from the facility. Such treatment may be provided on an outpatient basis.
  - (c) The WHI may encounter a worker with a disability employed at a subminimum wage rate in a competitive industry by an employer who does not have a certificate. In this case, the WHI should advise the employer of the steps required to obtain such a certificate, and must also explain that the certificate cannot be granted retroactively. Prior to the centralization of the certification process, WHIs had the authority to issue temporary certificates when encountering such situations, but this is no longer the case.
  - (d) WHIs may encounter hospitals or institutions that do not hold a section 14(c) certificate but are employing patients at subminimum wages, and/or work centers that do not hold a section 14(c) certificate but employ workers with disabilities at subminimum wages. Although certificates will not be issued retroactively and back wages are most likely due the workers, the WHI shall advise such employers of the section 14(c) certification process and program.

#### **64g02 Posting of notices and informing employees of the terms of the certificate.**

##### **(a) Posting of notices**

- (1) 29 CFR 525.14 requires that every employer having workers that are employed under subminimum wage certificates shall at all times display and make available to employees a poster as prescribed and supplied by the Administrator. This poster, *WH 1284*, may be downloaded from the WHD homepage on the internet at [www.dol.gov/dol/esa/public/regs/compliance/posters/disab.htm](http://www.dol.gov/dol/esa/public/regs/compliance/posters/disab.htm).
- (2) Where the employer finds it inappropriate to post the poster, he or she may provide the poster directly to all employees who are subject to its terms.

##### **(b) Informing employees of the terms of the certificate**

- (1) Each worker with a disability and, where appropriate, a parent or guardian of the worker shall be informed, orally and in writing, of the terms of the certificate under which such worker is employed. This requirement may be satisfied by making copies of the certificate available (*see* 29 CFR 525.12(g)).



- (2) Where a worker with a disability displays an understanding of the terms of a certificate and requests that other parties not be informed, it is not necessary to inform a parent or guardian.

**64g03**     **Prevailing wages.**

- (a) Determining the prevailing wage is the first step toward establishing the correct commensurate wage. The prevailing wage is the wage paid experienced workers who do not have disabilities in the vicinity performing essentially the same type of work (*see* 29 CFR 525.10(a)). An employer must be able to demonstrate that the prevailing wage rate used to determine a commensurate wage was objectively determined. Normally, prevailing wage rates are based on the results of *surveys* conducted by the employer holding the section 14(c) certificate.
- (b) The prevailing wage survey must be conducted prior to paying a subminimum wage. It then must be reviewed and updated at least once a year (more frequently when a change in the prevailing wage has most likely occurred, such as when the FLSA section 6(a)(1) minimum wage has increased). Prevailing wage surveys are conducted in the same manner regardless of the employer's method of payments (*i.e.*, piece rate, hourly wage, salary, etc.).
  - (1) Prior to the effective dates of the last two increases in the minimum wage, the NO has reminded all certificate holders, by letter, of the requirements of reviewing and adjusting prevailing wage rates.
  - (2) It is the intention of the NO to continue this notification process for any future increases in the minimum wage.
- (c) The prevailing wage is not an entry-level wage or a training wage, but the wage rate paid experienced employees after completion of any training or probationary periods. An experienced worker is one who has learned the basic elements or requirements of the work to be performed, ordinarily by completion of a probationary or training period. Typically, such a worker will have received at least one pay raise after successful completion of the probationary or training period (*see* 29 CFR 525.3(k)).
- (d) The prevailing wage may not be lower than the applicable statutory minimum wage as established by section 6(a)(1) of the FLSA, or where applicable, a higher state minimum wage. Employers must ensure that the wage rates they are quoted when conducting the prevailing wage survey meet this criteria.
- (e) To conduct a survey, the employer must obtain wage information for each job classification being performed by workers to be paid a subminimum wage. A brief job description should be prepared. This job description will also be important when conducting time studies, and will assist the WHI in determining compliance. The job description should:
  - (1) define the specific job duties, responsibilities, and tasks;
  - (2) include types of equipment and supplies used to perform the tasks;
  - (3) list types of skills, education, or experience levels required; and
  - (4) indicate the location, and days and times of the week the work is to be performed.

- (f) The employer should obtain wage data from comparable firms in the area. The appropriate size of the sample (*i.e.*, the number of firms surveyed) will depend on the number of firms doing similar work, but normally should include no less than three (*see* 29 CFR 525.10(c)).
- (1) The information should be solicited from comparable businesses employing primarily workers who do not have disabilities performing similar work in the vicinity where the worker with a disability is employed (*see* 29 CFR 525.10(c)). A *comparable business* is one that either employs a similar number of employees or competes for contracts of a similar size and nature.
  - (2) If similar work cannot be found in the area defined by the geographic labor market (*i.e.*, the vicinity), the closest comparable community should be used (*see* 29 CFR 525.10(c)). When this is not possible, the employer has two options:
    - a. The employer may obtain wage information from sources other than comparable businesses as long as the data obtained reflects non-entry-level wage rates. Examples of other sources of wage information might be the Bureau of Labor Statistics, state employment services, temporary help firms, and private employment services.
    - b. The employer may identify the general characteristics of the job to obtain a generic job description and search for employers whose work has similar characteristics. For example, such job comparisons might be made as follows: skilled, semi-skilled, or unskilled; light duty or heavy duty; and either handwork or machine-assisted. Using these comparisons, a generic job description could, for example, be unskilled, light duty, hand bench assembly, or semi-skilled, machine-assisted packaging.
- (g) There are special situations in which an employer is not required to conduct a survey to determine the prevailing wage.
- (1) If an employer's workforce consists primarily of workers who do not have disabilities, the employer is not required to do a survey.
    - a. Instead, the employer may use, as the prevailing wage rate, the rate he or she pays to his or her experienced workers without disabilities who perform similar work. Similarly, if an agency or facility places a worker with a disability on the premises of such an employer, the wage paid to the employer's experienced workers who do not have disabilities may be used as the prevailing wage (*see* 29 CFR 525.10(b)).
    - b. Should an employer whose workforce consists primarily of workers who do not have disabilities choose to perform a prevailing wage survey (rather than adopt, as prevailing, the established wage rate already being paid his or her experienced workers), the WHD requires that the employer include the wage data from his or her own firm when conducting the survey and computing the prevailing wage. This is because the employer's own wage data would most perfectly comport with the requirement of 29 CFR 525 that the commensurate wage be based upon the wage rate paid to experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the vicinity in which the individual earning

the subminimum wage is employed. To ignore the employer's own data in such situations would unfairly ignore the employer's impact on the wages being paid in the vicinity.

- (2) If the section 14(c) employer has a subcontract to perform a job in essentially the same way and with the same type of equipment as the prime contractor, the section 14(c) employer may use the wage rate the prime contractor pays to his or her experienced workers as the prevailing wage rate.
  - a. The WHI should compare the job methods and equipment used by employees of the section 14(c) employer with those of the contractor to determine if there is a difference. If a difference is discovered, the WHI must determine whether the difference is great enough to change the characteristics of the work performed. If the characteristics of the work have changed (*e.g.*, changes in the type of product produced or the process used to produce the product), the contractor's wage may no longer be the appropriate prevailing wage.
  - b. If the prime contractor discontinues the job by subcontracting all the work to the section 14(c) employer, the section 14(c) employer must conduct a prevailing wage rate survey.
- (h) The employer must maintain the following documentation regarding prevailing wage surveys (*see* 29 CFR 525.10(g)):
  - (1) Date of contact with firm or other source
  - (2) Name, address, and phone number of firm or other source
  - (3) Name and title of individual contacted within the firm or other source
  - (4) Wage rate information provided by firm or other source
  - (5) Brief description of work for which wage information was provided
  - (6) Basis for the conclusion that the wage rate was not based upon an entry-level position
- (i) After obtaining at least three wages rates (*see* 29 CFR 520.10(c)), the employer must average them to determine the prevailing wage for a particular job. The employer may use either a weighted or simple average so long as he or she is consistent. See the following example:

Weighted Average vs. Simple Average			
Employer	Number of employees	Wage rate reported	Gross wages (number of employees times wage)
XYZ, Inc.	99	\$5.85	\$579.15
ABC, Inc.	17	\$5.95	\$101.15
RST, Ltd.	25	\$6.20	\$155.00
3 employers	141 employees	\$18.00	\$835.30

Weighted average:  $\$835.30 \div 141 \text{ employees} = \$5.92411$  or \$5.93

Simple Average:  $\$18.00 \div 3 \text{ employers} = \$6.00$

Note: in the weighted average example, the prevailing wage rate is \$5.92411, but the employer rounded it up to \$5.93 per hour. If the employer rounded to \$5.92, he or she would be establishing a prevailing wage rate that is *less* than the true prevailing wage rate (less by \$0.0041 per hour). The WHD will not normally question computations that are carried out to the fifth decimal point and then *rounded up* to four decimal places. The employer could, of course, round up (but not merely round off) sooner. For example, 0.04974 should be rounded to 0.0498 or 0.05 (*see* FOH 64g06(f)(1)).

**(j) Evaluating employer’s prevailing wage rates**

- (1) The WHI should review the prevailing wage survey data requested during the initial conference, and use his or her knowledge of wage rates in the area to evaluate the wages contained in the survey.
  - a. If the section 6(a)(1) minimum wage is cited as a prevailing wage, the WHI should verify that the employer has sufficient documentation to prove that the minimum wage was the rate being paid experienced workers, rather than entry-level workers (*see* 29 CFR 525.3(k)).
  - b. Should the WHI question the accuracy of the employer’s prevailing rate, he or she should contact the employer’s sources of wage information to verify the validity of the rates listed and accuracy of the work descriptions, and to confirm that the rates are not for entry-level work. When conducting these calls, the WHI must take care that the sources contacted are not left with an impression that the employer with the subminimum wage certificate has violated the FLSA.
- (2) The WHI should be aware that there might be more than one correct prevailing wage in the same vicinity. Depending on sources and the methodology (*e.g.*, whether a

simple or weighted average was used), two employers in the same vicinity may obtain slightly different rates. The range should be fairly narrow. A prevailing wage rate that differs only slightly from others in the same vicinity should not be challenged, provided the employer supplies documentation to demonstrate that he or she conducted the survey in a thorough and conscientious manner.

- (3) Employers sometimes make arbitrary adjustments in the prevailing wage to account for differences in duties, methods, equipment, and responsibilities between the work done by section 14(c) employees and work done by employees who do not have disabilities in a competitive industry. This practice, known as *de-skilling*, is not permitted. If comparable jobs cannot be found, prevailing wage data should be collected on jobs requiring the same general skill levels. The following is an example of de-skilling:

Scenario:

Assume that the properly determined prevailing wage for packaging by hand is \$8.00 and that the hand packing job performed in a competitive industry normally includes the following steps: counting bolts, placing a label on the bag the bolts go in, putting 10 bolts into the labeled bag, putting 24 filled bags into a box for packing, and then sealing the box.

De-skilling occurs when the employer lowers the prevailing wage because the workers with disabilities do not perform all components of the job that was surveyed. The workers with disabilities may not perform all components of the job because of the manner in which the work was assigned, because they are unable to or refuse to perform certain of the work components, or the particular contract being performed does not require all of the components. An example of de-skilling would be when the employer, for whatever reason, decided that labeling the bags is not as difficult as counting 10 bolts, and therefore, the subminimum wage of an employee who only performed labeling should be based on a prevailing wage of \$7.25 an hour rather than \$8.00. The same would be true if the employer decided that the subminimum wage of an employee who only sealed the boxes should be based on a prevailing wage of \$7.50 an hour.

De-skilling is an inappropriate adjustment to the prevailing wage that adversely impacts the commensurate wage. Some employers may also attempt to improperly reduce commensurate rates when evaluating the performance of workers with disabilities by penalizing them for not performing all components of a job. This process, known as *factoring*, is discussed in FOH 64j02(b)(2)b.1.B.

- (4) If the WHI finds the information obtained by the section 14(c) employer unacceptable, or if the employer failed to conduct a prevailing wage survey, the WHI should request the employer to perform the survey (following the procedures and guidelines found in this section of the FOH). The WHI will then review the results of the new survey. Should the employer decline to conduct a new prevailing wage survey, the WHI will conduct the survey. Documentation of the survey conducted by the WHI must be included in the case file. The WHI shall also determine if the employees with disabilities are due back wages because of the firm's failure to properly determine the prevailing wage.

**64g04**     **Work measurement.**

- (a) Before an employer can convert the prevailing wage into a commensurate wage, he or she must conduct a work measurement to determine the standard for a worker who does not have a disability.

(b) **Work Measurement**

*Work measurement* refers to the process of determining the amount of time it should take a worker who does not have a disability to perform an operation, or element of an operation, using a prescribed method. This amount of time becomes the standard against which the productivity of the worker with a disability is compared to determine the commensurate wage. Three criteria must be met to obtain an accurate determination:

- (1) The work being measured 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 to properly perform the operation
  - (2) The work must be done at a pace that could be maintained by an employee over an entire work shift
  - (3) For workers being paid a piece rate, an allowance must be made for the worker's personal time, fatigue, and unavoidable delays (PF&D) time (*see* 29 CFR 525.12(h) and FOH 64i01)
- (c) The regulations do not require that employers use any particular method of work measurement, but the method used must be verifiable through the use of established industrial work measurement techniques. The following methods of work measurement have been accepted by the WHD:

- (1) Timing the work with a stopwatch (*see* FOH 64i00(c))
- (2) *Methods-Time Measurement (MTM)*

This phrase refers to a work measurement system established in 1948 in which a predetermined time value is assigned to every manual motion involved in performing a given task. The time required to complete a unit of work is derived by first adding together the time values for each motion involved, and then adding a PF&D factor. Generally, not less than a 15 percent allowance (*i.e.*, 9 or 10 minutes per hour) is used to allow for PF&D (*see* 29 CFR 525.12(h)(2)(ii)). The original MTM, now referred to as MTM-1, had 450 time values. It has been replaced by a simplified version, known as MTM-2, which has only 30 to 50 time values, and thus, is easier to learn and apply accurately (*see* FOH 64i01 for more information on PF&D).

- (3) *MODular Arrangement of Predetermined Time Standards (MODAPTS)*
  - a. MODAPTS, a work measurement system developed by Australian chemical engineer G.C. Heyde and introduced in 1966, is a predetermined time system that deals with standard time values or units of human physical work, termed "modules" or "MODS." These MODS are related to movements of the human body as work is performed.

- b. The following brief description of the development, processes, and application of MODAPTS is provided to assist WHIs in their understanding of this popular work measurement system.
1. Heyde determined that all body movements can be expressed in terms of multiples of a single unit of time. This single unit of time (a MOD that equals 129 milliseconds, 0.129 seconds, or 0.00215 minutes) is the time required to complete a single finger movement. The MODAPTS practitioner determines the number of MODs required to complete a particular motion, and assigns a code to the motion. A general rule of thumb is that one MOD equals  $\frac{1}{7}$  of a second.
  2. MODAPTS divides body motions into three classes: “Movement,” “Terminal,” and “Auxiliary.” These classes are subdivided further.
    - A. Movements, for example, are then classified depending on the joint or hinge that must move in order to complete a movement. The greater the movement, the more MODs are required to complete it. For example, moving the hand at the wrist two inches to retrieve an object is coded as “M2.” “M” indicates that it was a movement motion, and “2” indicates that the movement had a MOD value of two. Moving the whole arm is coded as “M4” and movements from the shoulder involving the body trunk are coded “M7,” meaning that it takes 7 MODs, or approximately 1 second, to perform the motion.
    - B. Movements motions are followed by terminal activities. Terminal activities are divided into activities coded “G” (for “Gets”) or “P” (for “Puts”) with more MODs assigned, as the activity becomes more complicated. For example, picking up a dime from a flat surface (a “Get”) is slightly more difficult than picking up a pencil (another “Get”). The pencil can be picked up with a single grasping motion of the fingers, but picking up the dime requires additional finger manipulation. Therefore, the movement of picking up the dime is given two more MODs than picking up the pencil. Picking up the dime is a “G3,” while picking up the pencil is only a “G1.”
    - C. Auxiliary activities include all other activities. Two examples include walking (coded “W”) and reading (coded “R”). A single step in an unrestricted area is given 5 MODs (coded “W5”) and reading one word in a group where the purpose is to get only the overall message is given 2 MODs (coded “R2”).
  3. The following, based on the sample codes just provided, is the coding for an individual who takes a single step to a table, reads a sign telling him or her to pick up the dime lying on the table in front

of him or her, reaches out with his or her whole arm, and picks up the dime: “W5R2M4G3.” This is a total of 14 MODs, or approximately 2 seconds (14 MODs times .129 seconds per MOD equals 1.806 seconds).

4. In this same manner, the MODAPTS practitioner analyzes a job as it is performed by an average experienced worker, codes the motions required to do the job, and tallies the total number of MODs. The total MODs are converted to minutes or hours, and multiplied by an allowance factor, which accounts for PF&D time, to determine the total standard time required to complete the job.
5. Proponents of this system claim that, of all predetermined time standards systems, MODAPTS is the fastest to use, the most accurate, and the easiest to learn. The MODAPTS proponents claim this system is superior to stopwatch time studies since it eliminates performance rating, or the subjective practice of evaluating the speed and effectiveness of the worker being studied.

#### **64g05**     Commensurate wages.

- (a) Section 14(c) permits employers to pay workers who are disabled for the work being performed a commensurate wage (*i.e.*, a subminimum wage based on the worker’s individual productivity in proportion to the wage and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the vicinity in which the worker with a disability is employed).
- (b) In order to determine the commensurate wage, the employer must first examine the work to be performed by the employee with a disability, and through the use of an accepted work measurement technique, develop a standard that accurately measures the quality and quantity of that same work when performed by workers who do not have disabilities. The commensurate rate is determined by comparing the performance of the worker with a disability against that standard for a worker who does not have a disability. Work measurement methods, such as time studies, are used by employers to determine the length of time it should take to perform an operation, or element of an operation.
- (c) **Pooling of piece rate earnings**  
  
Each worker with a disability employed on a piece rate basis should be paid the full earnings resulting from his or her own productivity. The WHD discourages the pooling of earnings since an employer may not be fulfilling commensurate wage responsibilities to each individual worker. Employers may pool earnings only when piece rates cannot be established for each individual worker and should make every effort to objectively divide the earnings according to the productivity level of each individual worker (*see* 29 CFR 525.12(i)).
- (d) Behavior or general work habits, such as cleanliness, attitude, or attendance, must *not* be considered when establishing commensurate wage rates because they are not objective measures of production. Comments like “accepts criticism,” “responds appropriately to visitors,” “interacts well with others,” and “follows general safety habits” indicate that such behaviors or related factors may have been used when rating the worker with a disability.



(e) **General guidelines for evaluating accuracy of commensurate wage rates**

- (1) If the FLSA minimum wage increased during the standard 2-year investigative period, verify that the employer re-examined prevailing wage rate data and recalculated commensurate wage rates. An increase in the minimum wage usually affects the prevailing wage rate because of its ripple effect on wages paid experienced workers, or because the new minimum wage is greater than the old prevailing wage. The employer's re-examination of the prevailing wage data shall take place no more than 60 days after the date of the increase in the minimum wage.
  - a. If the prevailing wage used by the employer is less than the new minimum wage, the employer should adjust the wage upward. This adjustment and subsequent recalculation of the initial commensurate wage rate should be completed and effective on the date of the minimum wage increase. After this adjustment has been made, if the prevailing wage is more than the new minimum wage, the employer must still re-examine his or her prevailing wage rate data by contacting the sources of wage information to determine if the information provided earlier has changed.
  - b. The employer also has the option of making a simple blanket adjustment by increasing the prevailing wage by the same percentage as the increase in the minimum wage.
- (2) If the workers are all paid the same wage, or if the range of wages is quite narrow, the accuracy of the commensurate wage rate becomes questionable and requires a closer look. Because individuals demonstrate a wide variety of skill levels, if the employer's commensurate wages are actually based on the employees' quantity and quality of work, wages should also reflect this range of skills.
- (3) Be sure to check the employer's rounding practices. Piece rates are always rounded up, even though the digit to be rounded is less than the numeral five. Because this practice differs from usual rounding procedures, employers frequently make an error when computing commensurate wages based on piece rates (*see* FOH 64i01(b)(2)).

**64g06 Time studies and jobs paid piece rate.**

(a) **General**

- (1) If a prevailing wage survey finds that a piece rate prevails for the kind of work to be performed by the worker with a disability, there would be no need to conduct a time study for that job. The worker with a disability should be paid the same piece rate established by the prevailing wage survey. A piece rate fixes a wage payment on each completed unit of work. When the worker with a disability is to perform a production job, the simplest and most objective method of payment is by piece rate.
- (2) If the prevailing wage survey indicates that an hourly rate prevails for the kind of work performed by the worker who does not have a disability, and the section 14(c) employer wishes to pay a piece rate, time studies would be required to convert the hourly rate to a piece rate. *See* FOH 64g07 and FOH 64j for guidance on computing *hourly* commensurate wage rates.

**(b) Time studies**

- (1) In order to compute a commensurate wage rate, employers must determine how long it takes the standard setter (*i.e.*, the average experienced worker who does not have a disability) to perform the job. This is normally done by conducting time studies.
- (2) Time studies are normally conducted using staff members of the facility (*i.e.*, individuals without disabilities for the work) who have been given sufficient time to practice and prepare.
- (3) The WHD does not require facilities to use one specific work measurement method, nor does the WHD prescribe the format or length of the time study. However, the facility must demonstrate to the WHD that the method is generally accepted by industrial engineers and that it was done accurately (*see* 29 CFR 525.12(h)(1)). There are several acceptable methods that an employer may use for establishing piece rates. Any time study method used to establish piece rates must be verifiable. This section (FOH 64g06) contains procedures that workshops typically follow in conducting stopwatch time studies. These may be used by a WHI to verify the results of an existing time study or to conduct a confirming time study.
- (4) The methods used to establish the average hourly production of the standard setter may range from relatively simple techniques, involving rudimentary counting of job samples over a fixed period of time, to sophisticated industrial engineering techniques like MTM and MODAPTS, discussed above. An example of one method that is acceptable to the WHD is a 25-minute stopwatch time study observing three workers who do not have disabilities.
- (5) During investigations, WHIs will normally conduct, or oversee the employer conduct, time studies, either to verify the accuracy of the employer's time studies or because the employer has failed to conduct the necessary studies.
- (6) *See* FOH 64i00(c) for a detailed description on how to conduct time studies.

**(c) Criteria for accurate time studies**

- (1) As mentioned, the productivity of workers who do not have disabilities is measured by time studies.
  - a. The performance of the individual being time studied should represent a normal productivity level. The standard setter should not work, or be encouraged to work, so fast that he or she could not maintain that pace over a work shift. If the standard setter's performance is above or below normal performance levels, adjustments (or leveling) may be done to compensate, but only by someone knowledgeable in this technique, as evidenced by successful completion of training in this area (*see* 29 CFR 525.12(h)(2)(i)).
  - b. The subject of the time study should be permitted to practice the work until he or she is comfortable and can perform without hesitation. Employers wishing to establish piece rates are required by 29 CFR 525.12(h)(2)(ii) to make an allowance for PF&D. This allowance is discussed in FOH 64i01.

- (2) Subjects being time studied should use the same work methods as those used by the majority of workers with disabilities.
  - a. The WHI may find that job modifications, such as the use of jigs and fixtures, have been made to accommodate the special needs of a worker. If these modifications increase the productivity of the worker with a disability, but would impede a worker without a disability, no additional time studies are required (*see* 29 CFR 525.12(h)(2)(iii)).
  - b. However, an additional time study will be required when entirely different methods of production are used, as opposed to the modification of the existing method, or when a worker does not have access to certain equipment.

Scenario:

An employer has 5 production machines and 10 full-time employees who have disabilities that adversely impact the work being performed. If the production standard was established using machines, an additional time study is required because at least five of the workers must perform the job manually at any given time. Producing materials by hand is a completely different production method than producing materials by machine.

- (3) The time study should include all operations of the job to be performed by the worker with a disability, such as set-up activities, packaging, counting, boxing, and irregular operations like retrieving supplies.
  - (4) When employees work on a contract, they must use the same methods and materials that were used during the time study. Any change would require another time study.
  - (5) If the time study method used by the facility appears to be unsound, the facility should redo the time study with WHI oversight to demonstrate to the WHD that the method was accurate. For example, if a facility used a 10-minute time study and the pace of work maintained during the time study, when contrasted with the pace of workers on the floor, appears unrealistic and unsustainable throughout the workday, the facility must redo the time study. The duration of the new study would have to be long enough to demonstrate that the pace of the 10-minute study could be maintained for an entire work shift.
- (d) There are certain distinct differences in the time study procedures depending on whether the employer wishes to pay a piece rate or an hourly rate to the worker with a disability. The procedures to follow for time studies are explained in detail in FOH 64i for piece rates and FOH 64j for hourly wages. Some of the similarities and differences between the two types of time studies are discussed below:
- (1) *Similarities*
    - a. Both require an accurate description of the work to be performed, including a task analysis detailing the method(s) actually used by employees when performing the job, the materials, and any equipment required.

- b. Both require the selection of an individual who does not have a disability for the work to be performed (*i.e.*, the standard setter) who is familiar with the work and capable of maintaining a consistent, efficient pace.
- c. Both require that a time study be conducted of the individuals who do not have disabilities for the task performing the same tasks that the worker with a disability will be employed to perform.
- d. Both require consideration of quantity and quality of production.

(2) *Differences*

- a. Who is time studied and who is evaluated:
    - Piece rate: time study the worker who does not have a disability to set piece rate for workers with disabilities. The worker with a disability is not observed and/or evaluated.
    - Hourly rate: time study the worker who does not have a disability to establish the standard against which the worker with a disability is then observed and/or evaluated.
  - b. PF&D consideration:
    - Piece rate: required when setting piece rate.
    - Hourly rate: not required when setting hourly rate, but the WHI may encounter situations where employer includes a PF&D when determining hourly commensurate wages. If PF&D is used in the evaluation of the worker with a disability, it must also be used when conducting the time study of the standard setter(s). It is important to remember that evaluations are not to be conducted if the worker is fatigued or subject to conditions that would lower productivity.
  - c. Quality of work:
    - Piece rate: quality standards (*i.e.*, determining what is an acceptable, non-defective product) are established prior to conducting the time study. The standards setter (during the time study) and the worker with a disability (during actual production) must be held to the same standards of quality and/or product acceptance.
    - Hourly rate: employers must hold both the standard setter and the worker with a disability to the same standard of quality. Counting rework time the same for both is one way of doing this provided the same methodology is used for both. Otherwise quality must be considered separately. Methods that employers have used to do this are the inclusion of Rework (*see* FOH 64j02(b)(1)) and the 90/10 Rating (*see* FOH 64j02(b)(2)).
- (e) To determine the adequacy of the time study methodology used by a facility under investigation, the WHI should conduct, or observe the employer conduct, confirming time

studies on two or three of the facility's larger on-going contracts (*see* FOH 64i00(d)(4) below).

**(f) Indicators of an accurate piece rate commensurate wage rate**

- (1) One way to test the accuracy of an employer's commensurate wage rate is to multiply the employer's piece rate by the standard setter's expected productivity. This must equal at least the prevailing wage. Note that the WHD will not normally question computations that are carried out to the fifth decimal point and then *rounded up* to four decimal places. The employer could, of course, round up (but not merely round off) sooner. For example, 0.04874 should be rounded to 0.0488 or 0.05. The reason for this practice is demonstrated in the following example:

Scenario:

The prevailing wage rate is \$6.65. The standard setter produces 324 units in a 50-minute hour. This takes into account an adequate PF&D allowance as required by 29 CFR 525.12(h)(2)(ii) and FOH 64i01. Note: any partially completed units produced during the time study are not included when computing the standard. Only whole, completed units are counted. \$6.65 divided by 324 equals \$0.0205246 per piece. This piece rate is rounded up at the fourth decimal to a rate of \$0.0206 per piece. The piece rate, \$0.0206, is then multiplied by 324 units per hour to obtain the hourly rate of \$6.6744, a rate that is not less than the prevailing wage of \$6.65.

However, consider the consequence to the worker with a disability if the employer had *not* carried the piece rate to at least five decimals and then rounded up at the fourth decimal. For example, if the above employer had rounded the rate to \$0.02 per piece, the resulting hourly rate would have been approximately 17 cents below the prevailing wage of \$6.65 (\$0.02 per piece times 324 units per hour equals only \$6.48 per hour). This means the worker with a disability would have to perform *better* than the worker who does not have a disability in order to earn the same prevailing wage.

Thus, the differences in rounding procedures, which to some employers seem so unimportant, actually have a significant effect on the wages of the worker with a disability. The worker who has a disability for the job being performed may be paid the exact commensurate wage or may be paid more than the commensurate wage, but *may not be paid less* than the commensurate wage. By carrying the piece rate out to the fifth decimal and then rounding up, the employer ensures that the worker being paid the subminimum wage receives at least the required commensurate wage.

Note: numbers displayed on a computer screen may not reflect actual amounts used by the computer in making calculations. Calculations done on spreadsheets should be verified by calculator computations using five decimal places and then rounding up to four decimal places. The employer has the burden of paying not less than the commensurate wage and must demonstrate by obvious calculation that he or she has done so.

- (2) Another indicator of an accurate piece rate would be when the number of units the standard-setter has to produce, at the established piece rate, to earn the prevailing wage represents a reasonable amount (*i.e.*, not an unrealistic expectation).

- (3) A third indicator of an accurate piece rate would be when piece rates have been increased in the past year on contracts that have been continuously worked and are older than 1 year. This most likely indicates that the annual prevailing wage review has been conducted and proper piece rate adjustments have been made.
  - (4) Finally, an indicator of an accurate piece rate would be when an adequate PF&D allowance was incorporated into the time study used to establish piece rates.
- (g) More detailed information on PF&D allowances and the conducting of time studies when an employer wishes to pay workers with disabilities a piece rate may be found in FOH 64i.

**64g07**     **Hourly commensurate rates.**

**(a)     General**

- (1) If the employer chooses to pay the worker with a disability an hourly rate, a specifically defined, objective production standard for an experienced worker who does not have a disability must be established. This is done through some form of work measurement, frequently time studies. The facility must then evaluate the productivity of each worker with a disability who is to be paid hourly to determine his or her hourly rate in relation to the standard productivity of the worker who does not have a disability for the job being performed.
- (2) Workers with disabilities who are paid by the hour must be evaluated, at a minimum, once every 6 months (*see* 29 CFR 525.12(j) for full requirements). In fact, items 13 and 14 of the WH-226-MIS require the employer's written assurance that he or she will evaluate hourly rated workers every 6 months (*see* 29 CFR 525.12(j)(3)). Evaluations must also occur when there is a perceptible change in productivity or when the duties of the job change.
  - a. The initial evaluation of a worker's productivity to determine his or her commensurate wage rate should be made within the first month of employment (*see* 29 CFR 525.12(j)(2)).
  - b. Some consulting organizations have advised employers to pay a training rate amounting to a specific percentage, often 50 percent, of the prevailing wage during the initial period before the worker with a disability is evaluated. Paying such a provisional rate is acceptable so long as the employer understands that he or she must make up the difference if the subsequent evaluation indicates that the training rate was below the employee's commensurate rate. Should the provisional training rate actually exceed the appropriate commensurate wage rate, employers may *not* recoup any overpayments in future workweeks because these employee are still being paid below the FLSA section 6(a) minimum wage (*see* 29 CFR 531.36).
  - c. The results of the initial evaluation must be recorded and the employee's wages adjusted no later than the first complete pay period following the initial evaluation.
  - d. If the commensurate wage rate, determined by the initial evaluation, is greater than the wage paid prior to the evaluation, the facility must pay the

worker the difference, unless it can demonstrate that the initial payments reflected the commensurate wage due at that time (*see* 29 CFR 525.12(j)(2)).

- (3) When workers ordinarily paid by piece rate are occasionally called upon to perform an hourly task (*e.g.*, material handling), the facility may pay them for those occasional tasks at their average hourly piece rate based upon their average earnings during the most recently completed representative period, not to exceed a quarter. Employers must be consistent in the method used when computing the employee's average hourly earnings. Note that this principle also applies to downtime as discussed in FOH 64e01(b)(1). However, when these duties are regular and recurring, the facility should evaluate the worker to determine his or her commensurate hourly wage for the task.
  - (4) It is important to remember that employers must evaluate the productivity of hourly paid workers at least every 6 months and then adjust the workers' wages accordingly no later than the first pay period following each review. This is different from the requirement that the employer perform prevailing wage surveys annually. Changes impacting the subminimum wages paid workers with disabilities must be implemented immediately.
- (b) In order to determine an hourly commensurate rate, the employer must first define the job, including clear statements of the acceptable quality and quantity standards, and then establish how long it takes an experienced worker who does not have a disability to perform the job. This establishes the performance standard of the worker who does not have a disability for the work being performed. The regulations do not mandate the methods to be used to do this, but three of the more common methods are Rework, Performance Measurement III (PM III), and 90/10 Rating.

(1) *Rework*

Rework refers to a method of establishing both the standard for the worker who does not have a disability and the level of performance of the worker with a disability by conducting time studies that hold both to the same minimum acceptable levels of quality and quantity. Rework is the time spent by the worker redoing a product or work activity of unacceptable quality (*i.e.*, that does not meet the industry quality standard) in order to bring the work product up to the acceptable level of quality. A detailed description of the Rework methodology is contained in FOH 64j02(b)(1).

(2) *PM III*

One method used to determine hourly commensurate wage rates is known as PM III. The system was developed by Goodwill Industries and is used to measure the performance of workers with disabilities employed in the sorting and salvage work typically found in Goodwill work centers.

- a. Goodwill describes PM III as a work measurement that attempts to control all variables that occur at random in the workplace and that could affect the outcome of the measurement. Special workstations are designed for conducting the measurement studies in a controlled environment within the normal flow of the workday. Goodwill describes PM III as a controlled, on-the-job work sample that represents all significant tasks of the job being

rated. It requires at least 30 minutes for completion of tasks at a competitive level (*i.e.*, by workers who do not have disabilities for the work to be performed), including allowance for personal time and delay. The time for the client's performance, which also includes allowances for personal time and delay, is completed in the same situation and to the same quality level, and is then compared to the established time standard (*i.e.*, the one performed by the worker who does not have disabilities).

- b. PM III was reviewed by the NO and a determination was made that when properly employed, it meets the commensurate wage rate requirements of 29 CFR 525.12(j).

(3) *The 90/10 Rating*

One common and acceptable method to determine an hourly commensurate rate is a technique known as the 90/10 Rating. The 90/10 Form, though not an official DOL form, was developed under the auspices of the former Sheltered Workshop Advisory Committee that was disbanded in the early 1990s. This method assigns a 90 percent weighting factor to the quantity of work performed and a 10 percent weighting factor to the quality of the work performed. The 10 percent value placed on the quality of the work performed by the employee with a disability represents an attempt to minimize subjectivity (*see* FOH 64j02(b)(2) for a detailed discussion of how this method may be applied).

(c) **Indicators of an accurate hourly commensurate wage rate**

- (1) The average hourly earnings for the employees paid subminimum wages who have the least severe disabilities are now higher than they were in the preceding year.
  - a. It is to be expected that wage rates will increase as workers became more experienced and familiar with a particular job and/or task resulting in increases in their productivity and improvement in the quality of their work.
  - b. But it is important to remember that workers with the least severe disabilities will often progress to other employment, leaving those workers who have more severe disabilities for the job in the work center. In this case, average hourly earnings may actually decrease over time.
- (2) A significant number of hourly rated workers employed longer than 1 year has received a wage rate increase.
- (3) Semi-annual employee evaluations indicate that hourly wage rates have increased in proportion to corresponding increases in productivity.
- (4) As required by 29 CFR 525.12(j)(3), hourly wage rates have been reviewed and adjusted accordingly within the past 6 months.
- (5) The relationship of disability to earnings is important. If the employer primarily employs workers who are not severely disabled for the work to be performed, it would be reasonable to expect that at least some of the employees would be paid the section 6(a)(1) minimum wage on some contracts. The WHI should notice whether



there are workers who do not appear to have disabilities for the work to be performed, yet are paid wages significantly below the minimum wage. In some cases, though not all, this could signal improperly calculated commensurate wage rates.



**64h CONCLUDING ACTIVITIES****64h00 Back wage and civil money penalty (CMP) calculations.**

- (a) In addition to the guidance provided below, the back wage procedures in the FOH 53c shall be followed:
- (1) If a facility with a section 14(c) certificate fails to pay commensurate wages, back wages are calculated by taking the difference between the rate paid and the correct commensurate wage. In no case, other than possibly in the SCA, will the enforceable commensurate wage be more than the section 6(a)(1) minimum wage.
    - a. Note that in *Herman v. Vision Center of Central Ohio, Inc.* (S.D. Ohio, Case No. C2-94-657 (12/16/1997)), the district court held that once the Secretary of Labor (Secretary) issues a certificate approving a subminimum wage, the Secretary must have concluded that the subminimum wage must have complied with the law before the certificate was issued. The court noted that the Secretary has additional authority to investigate and revoke the certificate of a non-complying employer, and that a worker with a disability who is being paid a subminimum wage also may petition the Secretary to review the rate he or she is receiving.
      1. As a result of this decision, the SOL has advised us that it will only initiate actions to recover back wages due under section 6 and owed workers paid subminimum wages when the WHD has revoked the employer's certificate retroactively to the date the violations began. Revocation procedures, as set forth in 29 CFR 525.17 -19, should be commenced with the assistance of the RSOL as soon as it is determined that the criteria for revocation have been met and the employer has refused to comply with the provisions of section 14(c) and/or restore the back wages to the affected employees.
      2. When the investigation determines that a covered employee paid a subminimum wage does not have a disability for the work being performed and revocation of the certificate is not warranted for any other reasons, that employee may be properly *excised* from the certificate since he or she was improperly classified as having a disability for the work to be performed and is most likely due back wages.
      3. WHIs may, of course, continue to request and oversee the payment of back wages due workers paid subminimum wages without the retroactive revocation of the employer's certificate in those instances where the firm both agrees to comply and restore the back wages.
  - (2) If the facility does not have a certificate but has paid workers who have disabilities wage rates below the minimum wage based on their impaired productivity, the back wage calculations shall bring the rate to the full minimum wage required by section 6(a)(1).

- (3) Workers paid subminimum wages seldom work over 40 hours in a week, but remember that the same overtime principles apply to both workers with disabilities and workers without disabilities. In workweeks of less than 40 hours, the WHD will normally enforce commensurate wage rates *up to* the minimum wage required by section 6(a)(1) of the FLSA. In overtime workweeks, the WHD will enforce time and one-half the regular rate, which may be less than the section 6(a)(1) minimum wage but could also be more than the section 6(a)(1) minimum wage in an SCA case.
- (b) Joint employment**
- (1) If it has been established that an employee is jointly employed by two or more employers (*i.e.*, employment by one employer is not completely disassociated from employment by the other employer(s)), all of the employee's work for all of the joint employers during the workweek is considered to be one employment for purposes of the FLSA. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the FLSA with respect to the entire employment for the particular workweek.
  - (2) Joint employment principles may also apply to School-to-Work programs and community-based rehabilitation agencies. Where the school or agency takes responsibility for wage payments, it will also be primarily responsible for any back wages due. Should the school or agency refuse or fail to pay the back wages, the other joint employer(s) will be held responsible.
- (c)** Follow the procedures in the FOH 52f11(a)(2) regarding the computation, collection, and recording in WHISARD of back wages of less than \$20.00 that are due any worker with a disability who is paid a subminimum wage under section 14(c).
- (d)** Because many facilities using the section 14(c) exemption operate under tight budgetary constraints, the collection of large back wage amounts may require the use of an installment plan to protect the facility's solvency. Follow instructions in FOH 53c15. Installment plans shall include an acceleration clause requiring the full and immediate payment of all unpaid back wages in the event the employer fails to comply with the plan.
- (1) Employers may justifiably request an installment payment plan because of financial hardship, or to preserve certain benefits for their workers with disabilities who would otherwise be ruled ineligible because of the amount of the back wages where they paid in a lump sum.
  - (2) When installment plans are requested in order to preserve the benefits of workers with disabilities, interest will not be charged on the unpaid balances.
- (e) SCA back wages**
- (1) The prevailing wage for workers with disabilities performing on an SCA contract for the purpose of calculating the commensurate wage rate is the hourly rate reflected on the wage determination for the classification of work performed by the worker with a disability.
  - (2) Workers with disabilities must be paid the full SCA fringe benefit required by the wage determination. As with service employees without disabilities for the contract

work being performed, employers may discharge their fringe benefit obligation to workers with disabilities by providing “any equivalent combinations of ‘bona fide’ fringe benefits or by making equivalent or differential payments in cash” (*see* 29 CFR 4.177).

- a. The worker with a disability must be paid the stated health and welfare fringe benefit for all hours paid (normally up to 40 per week and 2,080 per year).
  - b. The amount of holiday and vacation benefits a worker with a disability is paid depends on the hours worked in a typical workweek and the applicable commensurate wage rate. Since there can be fluctuations in earnings of workers with disabilities over short periods of time, the regular rate for vacation and holiday pay should be determined by averaging the rates paid in the 4-week period preceding the week in which the holiday occurs or the vacation is taken. The facility is not permitted to minimize its fringe benefit obligations by deliberately selecting a 4-week period with unusually low rates of pay. The hours of vacation and holiday pay due workers with disabilities is determined in the same manner as for workers who do not have disabilities (*see* 29 CFR 4.173 -.174 and 29 CFR 4.176).
- (3) Section 4(c) of the SCA requires that a contractor succeeding a contractor that was signatory to a collective bargaining agreement (CBA) pay the full wages and fringe benefits contained in the CBA. This does not apply to work centers, however, or to other employers who exclusively employ workers at subminimum wages under section 14(c) certificates. These employers may pay employees who have disabilities for the work being performed subminimum wages commensurate to the SCA wage rates established by section 4(c).
  - (4) Section 6(e) of the FLSA requires SCA contractors and subcontractors to pay all employees who are not performing SCA-covered work and/or who do not have disabilities for the work being performed at least the full minimum wage required by section 6(a)(1). This is true even when there is no enterprise or individual coverage under the FLSA. If properly certified under section 14(c), the employer may pay workers who have disabilities for the work performed a subminimum wage (*see* FOH 64b03).
  - (5) The WHI should ensure that subminimum wage back wages due a worker with a disability under the SCA and section 14(c) of the FLSA are properly recorded in WHISARD (*see* FOH 54 for instructions).
- (f) CMPs may be assessed against employers possessing subminimum wage certificates when the WHI can establish that the employer’s FLSA monetary violations are repeated or willful (*see* FOH 52f14(a)(5)).
- (1) As per FOH 52f14(b)(1), a conciliation *shall not* be the basis for a repeated violation and the assessment of CMPs in a subsequent investigation. A self-audit, and this would include a self-audit of a section 14(c) employer overseen by a Certification Team Compliance Specialist, *may* be the basis for a repeated violation and CMP assessment in a subsequent investigation, provided there is adequate proof of prior minimum wage and/or overtime violations in the file for the WHD to sustain a CMP assessment.

- (2) When computing CMPs, WHIs shall not include in the count of employees for whom CMPs will be computed those workers paid subminimum wages that were due less than \$20.00 in back wages (*see* FOH 52f11(a)(2) -(3)).
- (3) Note that because of the principles explained in FOH 64h00(a)(1), an administrative action to collect such CMPs cannot be initiated unless the WHD has retroactively revoked the employer's certificate. As mentioned in FOH 6400(a)(1)a.2., it may be determined that certain workers are outside the coverage of the certificate and an administrative action to collect back wages due those employees may be initiated without revoking the employer's certificate.

#### **64h01 Disposition of findings and section 14(c).**

- (a) As with all investigations, a final conference will be held with the section 14(c) employer in accordance with current guidelines. WHIs will provide employers found in violation with a copy of 29 CFR 525 and record this in the disposition section of the narrative report.
- (b) When a section 14(c) employer agrees to comply and pay the back wages found due, the WHI should complete the case action following standard procedures while keeping in mind the special reporting requirements discussed below.
- (c) When a facility refuses to comply and/or refuses to pay the back wages, the district director (DD) or assistant district director (ADD), along with the regional enforcement coordinator: section 14 and the RA, will determine what further action is appropriate in the particular circumstance (*see* FOH 53c). Possible courses of action include a second-level conference, notification under section 16(b) and section 14(c)(5), initiation of hot goods actions, revocation of certificate, and/or referral to the SOL for litigation. The SOL shall be consulted regarding the issuance of any Letter of Findings (*see* FOH 64h01(e)(4)).
- (d) If a facility refuses to comply or pay subminimum wage back wages under the SCA, the PCA, and/or the CWHSSA, the DD and/or ADD should consider withholding and/or debarment action and follow the instructions set forth in the appropriate sections of the FOH.
- (e) **Notifying employer of investigation findings**

- (1) *No violations found*

At the conclusion of each investigation in which *no* violations were disclosed (the FLSA, the SCA, the PCA, and the CWHSSA), the DD or ADD shall send a notification letter to the director of the facility and send a copy to the president and/or chairman of the board of directors. Individual copies of the notification letter shall be placed in the case file, and forwarded to the regional enforcement coordinator: section 14 and the Certification Team in the Chicago RO.

- (2) *FLSA violations found*

At the conclusion of each FLSA investigation in which violations *were* disclosed involving workers paid a subminimum wage and future compliance was assured, a notification letter, also known as a Letter of Findings, signed by the DD and/or ADD detailing the investigation findings shall be forwarded to the director of the facility, and a copy will be sent to the president and/or chairman of the board of directors.

The letter shall state and explain any violations discussed during the final conference. If additional violations are charged after the final conference, the reasons for these violations and how they were substantiated shall also be stated in the letter. The facility's statements regarding future compliance shall be restated in the letter, and, if appropriate, a request shall be made to the facility to submit to the DO, within 30 days of the date of the notification letter, a written statement reflecting how it has achieved compliance. Individual copies of the notification letter shall be placed in the case file, and forwarded to the regional enforcement coordinator: section 14 and the Certification Team in the Chicago RO. *See* FOH 64k04(b) for information regarding the format to be used when preparing Letters of Findings and an example.

- a. DDs are encouraged to combine this letter with the standard confirmation letter that is sent to the firm to confirm coverage, agreement of compliance and payment of back wages, and date back wage payments are due, and to provide the background for assessing CMPs for any violations of section 6 and/or 7 that may be found in *future* investigations (*see* FOH 52f16(b)).
- b. When CMPs will be assessed for violations of section 6 and/or 7, separate confirmation letters (*i.e.*, Letters of Findings) and CMP assessment letters shall be issued when the violations involve workers with disabilities paid subminimum wages (*see* FOH 52f16(e)).

(3) *SCA, PCA, and/or CWHSSA violations found*

At the conclusion of each investigation in which violations of the SCA, the PCA, and/or the CWHSSA were disclosed and future compliance was assured, the employer will be notified by letter, signed by the DD and/or ADD, stating the investigation findings. The letter shall be forwarded to the director of the facility and the president and/or chairman of the board of directors. Individual copies of the above letter shall be placed in the case file, and forwarded to the regional enforcement coordinator: section 14 and the Certification Team in the Chicago RO. Note: if, in the above situation, violations of FLSA section 6 and/or 7 also occurred, contact the regional enforcement coordinator: section 14 prior to preparing the employer notification letter. Standard procedures regarding the notification of contracting agencies shall be followed.

(4) *Violations discovered (the FLSA, the SCA, the PCA, and/or the CWHSSA) and future compliance not assured*

DDs shall consult with the regional enforcement coordinator: section 14 and the SOL, through appropriate channels, prior to issuing any Letter of Findings when the employer has not agreed to come into compliance.

**64h02 Narrative report requirements for section 14(c) investigations.**

**(a) Profile section**

- (1) Precede the standard four-part narrative with a *work center/institution profile section*, a concise summary of the activities provided to the workers with disabilities, the nature of the work program, and the types of rehabilitation services offered. The profile should include the following:

- a. Corporate and legal name of the employer
  - b. A listing of all establishments operated by the facility
  - c. Primary disabilities of the workers served by the facility
  - d. Primary source of income of the employer (if possible, include as a D exhibit, a copy of the employer's most recent financial statement)
  - e. The nature of any board, lodging, or other facilities furnished
  - f. The name and address of the president of the board of directors or appropriate corporate officials if it is a for-profit corporation
  - g. The name of the executive director and length of service with the work center
  - h. A brief statement of the disposition of any prior investigation
- (2) For *patient worker* cases, also note the type of institution, whether it is for-profit or not-for-profit, public or private, and the primary disability group served. Report the total number of patients in the institution at the time of the investigation and the number of patients who are employees of the institution.
- (3) For investigations involving the SCA or the PCA, standard government contract reporting procedures shall be followed (*see* FOH 54b).

**(b) Coverage section**

It is important to document employees' covered status. Employees of section 14(c) certificate holders are usually covered on an individual basis. Reference the supporting documents in the coverage section of the narrative. These documents might include staff interviews reflecting that clients are engaged in interstate commerce, invoices showing goods shipped in commerce, initial conference notes including the employer's admission of coverage, or a list of major contracts on which employees work. This section should clearly describe the flow of goods in interstate commerce, identifying which employees are covered, and which employees, if any, are not covered.

**(c) Exemption section**

- (1) The exemption status of staff employees should be reported here, following normal reporting requirements.
- (2) Section 13(a)(7) provides an exemption for employees who are exempted by regulations, order, or certificate of the Secretary issued under section 14. Neither the FLSA nor the certificate exempts workers who have disabilities for the work being performed from the overtime provisions of the act.

**(d) Status of compliance section**

Discuss the investigation findings as they pertain to both workers who have disabilities for the work being performed and other employees of the firm following normal reporting requirements. In addition, discuss the following section 14(c) issues:



(1) *Misclassification*

If employees have been misclassified as having disabilities for the work being performed and paid a subminimum wage, discuss in the compliance section how these violations were substantiated and how back wages were computed.

(2) *Commensurate wages*

If the subminimum wage paid was not commensurate, include the following in the status of compliance section:

- a. An explanation of the method the facility used to derive the rate paid workers with disabilities, and why this method did not result in commensurate wages. Identify the steps taken to substantiate that commensurate wages were not paid, such as confirming time studies, a prevailing wage survey, staff interviews, and/or observations of hourly employees.
- b. An explanation of the violations that resulted from the failure to pay commensurate wage rates and what the facility must do to achieve compliance.

(3) *Certificate status*

Reference the certificate number and date of issuance, or note the absence of proper certification.

(4) *Section 14(c) recordkeeping*

The narrative should highlight any deficiencies in disability, productivity, and production standards records required by 29 CFR 525.16. Copies of time studies, prevailing wage surveys, and other documents substantiating either compliance or non-compliance should be incorporated into the case file and referenced in the narrative by exhibit number. Discuss here any violations regarding failure to inform workers of terms of the certificate and failure to display the poster.

(5) *Method of computation*

Clearly describe the method of back wage computation. List the back wage findings and the number of employees involved.

**(e) Disposition section**

Regular reporting procedures shall be followed. WHIs shall relate any explanation the employer offers for the violations and describe any actions the employer has agreed to take to come into and/or maintain compliance. WHIs will report all compliance assistance materials provided to the employer. The disposition section of the narrative should conclude with recommendations from the WHI as to what further action, if any, is necessary to ensure future compliance and back wage payment. For example, the WHI could recommend any of the following courses of action:

- (1) Second-level conference
  - (2) Referral to the SOL for litigation
  - (3) Certificate revocation
  - (4) CMP assessment for willful and repeat section 6 and/or 7 violations and/or child labor violations
  - (5) Employee notification of section 14(c)(5) or section 16(b)
  - (6) Reinvestigation after a predetermined amount of time
  - (7) Appropriate actions involving government contract violations
- (f) Print the narrative and WH-51. The narrative report may be saved to database.

**64h03**     **WHISARD.**

- (a) Work center investigations and investigations of the employment of workers with disabilities in competitive employment under section 14(c) should be registered in WHISARD as “SMW14” cases. Patient worker investigations should be registered as “SMWPW.”
- (b) See the FOH for specific instructions for reporting the findings of work center and patient worker investigations. The WHI should ensure that subminimum wage back wages due a worker with a disability under the SCA and section 14(c) of the FLSA are properly recorded in WHISARD.
- (c) WHISARD uses the North American Industry Classification System (NAICS) rather than Standard Industrial Classification (SIC). Some of the more common NAICS are:
  - Private work centers: NAICS 62431 (private vocational rehabilitation services)
  - State operated work centers: NAICS 9180
  - Local government operated work centers: NAICS 9680

Note: the NAICS selection tree picks only government-operated facilities when the word “sheltered” is entered.

**64h04**     **Advising section 14(c) certification team and regional enforcement coordinator: section 14 of investigation findings.**

- (a) After the investigation has been concluded, the DO shall forward a copy of WH-51, narrative, and correspondence advising the employer of the investigation findings to the appropriate regional enforcement coordinator: section 14 and the Certification Team located within the Chicago RO (*see* FOH 64d00(h) for the address of the Chicago RO). The Certification Team must have this information in order to properly process the firm’s application to renew certification.
- (b) This is in addition to the normal MODO follow-up procedures required by FOH 61.

**64h05**     **Petition for review.**

- (a) Any employee paid a subminimum wage, or his or her parent or guardian, may petition the Secretary, under section 14(c)(5) of the FLSA, to have the subminimum wage reviewed to determine if the wage is justified. Upon receipt of the petition, it shall be forwarded promptly to the NO, OP, DEPP, FMLA/OLS Branch. The NO will then promptly forward the document to the SOL who will contact the chief administrative law judge (ALJ) who will schedule a hearing to determine the validity of the subminimum wage. In all matters relating to the propriety of a subminimum wage, the burden of proof rests with the employer (*see* 29 CFR 525.22).
- (b) Although the petition does not have to follow a particular format or form, it must be signed by the individual, or his or her parent or guardian, and should contain the name and address of the individual filing the petition, and the name and address of his or her employer. A petition may be filed in person or by mail with the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S3510, 200 Constitution Avenue, NW, Washington, DC, 20210.
- (c) When a DO receives a complaint filed by an employee paid a subminimum wage, the complaint should *not* automatically be treated as a petition for a review of the subminimum wage by an ALJ. Unless the employee specifically requests a section 14(c)(5) action, the complaint should be scheduled for investigation in accordance with standard DO procedures. Then, if the investigation does not substantiate the complainant's allegation, the complainant should be informed of his or her right to petition under section 14(c)(5).
- (d) Since the statute establishes strict time frames for the processing and addressing of petitions for review, all actions by WHD personnel in handling such petitions must be taken promptly.



**64i ESTABLISHING PIECE RATES AND PERSONAL FATIGUE AND DELAY (PF&D) ALLOWANCES****64i00 How to determine an accurate commensurate wage based on a piece rate.**

- (a) If the prevailing wage study reveals that the prevailing wage is a piece rate, the employer should pay the same piece rate to the worker with a disability. In this situation, there is no need to perform a time study (*see* FOH 64g07 for what to do if the prevailing wage is hourly and the employer wishes to establish the hourly commensurate rate).
- (b) This section contains guidance for doing a time study when the prevailing wage survey indicated that workers were paid *by the hour*, not by the piece, and the employer wishes to pay a *piece rate* to the workers with disabilities. To determine this rate, the employer must time study workers who do not have disabilities or use other accepted work measurement methods (*see* FOH 64g04) before he or she can convert the hourly prevailing wage into an equivalent prevailing piece rate.
- (c) When stopwatch time studies are used, the steps the employer must follow to determine an accurate commensurate wage based on a piece rate, when the prevailing wage rate is an hourly wage, are discussed below. *See* FOH 64g04 and FOH 64i00(e) for guidance when MTM or MODAPTS work measurements are used.
  - (1) Develop a job description.
  - (2) Perform a task analysis.
  - (3) Select the standard setter(s).
  - (4) Time the worker(s) who do not have disabilities (*i.e.*, the standard setter(s)) performing the work.
- (d) The employer should have completed all these steps. They are discussed in more detail below. When reviewing an employer's time studies, the WHI should verify that, at a minimum, the employer completed the steps below that are in *Italics*. These are also the same requirements the WHI must follow when conducting his or her own time study, either because none was done previously or to confirm the results of the employer's study.
  - (1) *Develop a job description:*
    - a. *Define specific job duties, responsibilities, and general tasks.* The WHI must be able to verify that the work performed by the worker with a disability is the same as that performed in the time study.
    - b. *Specify the types of equipment and materials to be used.* The WHI must be able to verify that the material and equipment used by the worker with the disability is the same as that used in the time study.
    - c. *List the types of skills, training, or experience required.*
    - d. *Indicate the days and times the work is performed if such factors could have an impact on the productivity of the worker.*

(2) *Perform a task analysis:*

- a. *Identify the components, tasks, and subtasks to be performed.*
- b. *Develop an accurate picture of the method and procedures used to accomplish the tasks.*
- c. *Include types of equipment and supplies to be used. Specify the area where the work will be performed.*
- d. *Determine a definite start and stop point. The entire job cycle must be timed. The job cycle begins at a specific point, such as picking up the first piece in an assembly. It ends when that point is reached again. The WHI must be able to verify that the clock was not stopped to accommodate irregular elements (e.g., equipment failure or depletion of needed supplies), or that if it was stopped while the worker with a disability repaired errors, it was also was stopped while the standard setter was timed (see rework discussion in FOH 64j02(b)(1)).*
- e. *Ensure that when the worker with a disability performs the actual work, it is performed in the same way the standard setter performed the work when establishing the standard, or in a way that allows the worker with a disability to be more productive (see FOH 64i02 for use of jigs in time studies).*

(3) *Choose the standard setter(s):*

Most frequently, this will be a staff member(s) or worker(s) who is:

- Qualified to perform the task
- Familiar, experienced, and comfortable with the work
- Able to perform in a typical work environment
- Able to maintain a consistent and efficient pace
- Able to perform at or close to 100 percent productivity

Note: only if three staff members are not available and the job is extremely simple should the WHI attempt to time study himself or herself. It is very difficult for a WHI to both perform the work and time himself or herself.

(4) *Time the standard setter (i.e., the worker who does not have disabilities) performing the job:*

- a. This procedure is known as setting the standard.
- b. *The individual conducting the study (i.e., the observer) must:*
  - *Use a generally recognized method of work measurement (see 29 CFR 525.12(h)(1) and FOH 64g04).*

- *Assure that the standard setter performs the task exactly as it will be assigned to the worker with a disability.*
- *Structure the study to avoid, as much as possible, lost time situations. “Lost time” is a term used by NISH that the WHI may find on time study documents. Lost time is time excluded from a time study for an activity that is not a regularly recurring part of the job (e.g., time lost when a supervisor acting as the standard setter is interrupted during the time study by an employee’s question).*
- *Compare the standard setter’s actions to the written procedures.*
- *Time the standard setter’s work using the same start and stop points as designated earlier.*
- *Read the stopwatch and make recordings nearly simultaneously.*
- *Document the measurement used to set the standard. It is important that the employer and/or WHI record the method used, date the standard was set, and personnel involved in conducting the measurement to ensure the standard can be verified.*
- *Conduct the study three times and determine average time per unit. However, because the WHI will often need to confirm several time studies, if the original confirming study corroborates the employer’s results, the WHI is not required to repeat it. If, on the other hand, the results of the confirming study indicate a problem, the WHI should conduct further time studies.*
- *When possible, use three different people as standard setters. Although 29 CFR 525 does not specifically require timing three different people, using three different people allows for the fact that different people normally work at different paces.*
- *Conduct the study for a period long enough to ensure that the work pace may be sustained throughout the day. Many work centers conduct 25-minute time studies, although 29 CFR 525 does not require a specific length. For most assembly jobs, 20 to 25 minutes is long enough to establish a valid production standard.*
- *Make an allowance for PF&D (as required by 29 CFR 525.12(h)(2)(ii)). See FOH 64i01 below for a discussion of PF&D.*
- *Use these results to set the piece rate. For example, if the standard was 200 envelopes stuffed per hour after allowing for an appropriate PF&D (i.e., the average number done by the workers who do not have disabilities) and the prevailing wage was \$7.20, the piece rate would be \$0.036 per envelope ( $\$7.20 \div 200 = \$0.036$ ).*
- *The WHI must note whether the employer included rework time when setting the standard and whether the employer counted or discarded defective products. The practice must be the same for both the*

*standard setter and the workers with disabilities for the wage to be truly commensurate.*

**(e) Procedures for work centers using MTM or MODAPTS**

- (1) As explained in FOH 64g03(c), MTM and MODAPTS are acceptable work measurement methods.
- (2) The WHI should verify that the individual using these methods has received professional training in those methods.
  - a. Evidence of this training will be a certificate of completion for these specific methods. Training in similar sounding methods should be questioned.
  - b. Training that is secondhand should also be questioned. Secondhand training means that the work center sends one person to professional training and that person trains other staff members.
- (3) The WHI may find it necessary to conduct confirming stopwatch time studies of these work measurements.

**64i01 Allowance for non-productive time: PF&D required only for piece rate time studies.**

**(a) Defining PF&D**

- (1) Normal fatigue prevents all employees from producing at their most rapid pace throughout the work day. In addition, breaks, clean-up time, and delay time while materials are being restocked or the finished products are removed all reduce the amount a worker can produce.
- (2) Employers must take this non-productive time into consideration when determining piece rates by including what is known as a PF&D factor. 29 CFR 525.12(h)(2)(ii) states that when determining piece rates “[a]ppropriate time shall be allowed for personal time, fatigue, and unavoidable delays. Generally, not less than 15% allowances (9-10 minutes per hour) shall be used in conducting time studies.”
- (3) A properly computed piece rate will include a PF&D that also takes into account time spent by workers for traditional breaks or rest periods (*e.g.*, 10 to 15 minute breaks). When the PF&D factor has been accurately computed, the employer need not pay additional wages for these breaks. PF&D does not include or cover downtime as discussed in FOH 64e01(b)(1).
- (4) Employers who fail to provide the required allowance, or provide an insufficient allowance, are at an unfair competitive advantage to employers who do give an adequate PF&D allowance. If the WHI finds that a facility under investigation failed to make a proper allowance for PF&D when performing time studies to determine piece rates, that employer has most likely paid employees less than the commensurate rate and may have incurred a back wage liability under section 14(c).
- (5) The WHD will not object to an employer establishing a PF&D that is greater than required by the regulations as this would result in the worker with a disability receiving wages above the applicable commensurate wage.



- (b) The WHI should determine whether the PF&D allowance used in the time study is large enough to cover all non-productive time that constitutes hours worked (*e.g.*, waiting for more materials, taking coffee breaks, or waiting while adjustments are made to machines). Even though the facility may have made an allowance, if the WHI finds non-productive work time in excess of this allowance, the facility has most likely paid employees less than the commensurate rate and may have incurred a back wage liability under section 14(c). Should the WHI encounter a situation where it appears a 9- or 10-minute PF&D is not sufficient for the type of work being performed, he or she should, following established procedures, discuss this with the regional enforcement coordinator: section 14 prior to taking any action.
- (1) The PF&D allowance is incorporated into the piece rate to be paid workers with disabilities by either multiplying:
- a. the standard time it takes a worker who does not have a disability to perform a task by an allowance factor, *or*
  - b. the number of units produced by the worker who does not have a disability by an allowance percentage.
- (2) To calculate a piece rate, the facility divides the prevailing hourly wage by the average hourly production rate (*i.e.*, the average number of units produced in a 50- or 51-minute hour by a worker who does not have disabilities). More detail is provided below.

Scenario:

Three workers who do not have disabilities are each timed for 50 minutes. They produce a total of 840 units. Average productivity is 280 (840 divided by 3). If the prevailing wage is \$8.00 per hour, the piece rate would be \$0.0286 (\$8.00 divided by 280 units). A worker with a disability who produced 185 units in an hour would earn \$5.291 in that hour (185 multiplied by \$0.0286 per unit).

Note that in this example the exact piece rate, \$0.0285714, was *rounded up* to \$0.0286 per piece. The WHD will not normally question computations that are carried out to the fifth decimal point and then *rounded up* to four decimal places. 29 CFR 525.12(h)(1)(ii) states that piece rates “shall not be less than the prevailing piece rates....” For this reason, piece rates are always rounded up, even though the digit to be rounded is less than the numeral five. For example, 0.04934 should be rounded to 0.0494 (*see* FOH 64g06(f)). Because this practice differs from usual rounding procedures, employers sometimes make an error when computing piece rates. *Errors in rounding piece rates often result in a back wage liability.*

The example above is meant to demonstrate correct rounding practices used when computing piece rates. The WHI will note that the commensurate rate was \$5.291 in this example, more than the current section 6(a)(1) minimum wage of \$5.15 per hour. The employer would be in compliance with the FLSA if he or she paid the worker with the disability \$5.15 per hour rather than the commensurate rate of \$5.291. The section 14(c) employer is not legally obliged by the FLSA to pay a commensurate rate in excess of the applicable section 6(a) minimum wage.

- (3) A direct way to arrive at the 10-minute allowance is to use the 50-minute hour. The formula using the 50-minute hour is:

Number of Units Produced

Number of minutes  $\times$  50 minutes = hourly production standard

For 75 units produced in 15 minutes, the hourly production standard is 250 units:

75 units

15 minutes  $\times$  50 minutes = 250 units per (50-minute) hour.

- (4) In some cases, it may not be possible to do a 25-minute work observation and simply multiply by two to arrive at a 10-minute PF&D allowance. For example, there may be a job for which the employer has established a standard of 200 units per 50-minute hour, but there are only enough available materials to observe 100 units being produced. In that case, the WHI should compute an average time per unit from his or her observation and compare it to the average time per unit expected to be produced in a 50-minute hour (*i.e.*, 3,000 seconds). By dividing 3,000 seconds by 200 units, it is determined that it takes 15 seconds to produce each unit (3,000 seconds divided by 200 units equals 15 seconds per unit). This means that in 15 minutes (*i.e.*, 900 seconds), the employee may be expected to produce 60 units.
- (5) There may be a case where it appears that there are enough raw materials to observe three workers who do not have disabilities for 20 minutes, but not 25. If the employer is using a 10-minute allowance for PF&D, the average number of units produced in 20 minutes should be multiplied by 2.5 to arrive at the standard for that work observation. That standard can then be compared to the standard set by the employer's time study.
- (c) The WHI must be able to evaluate the variety of methods employers use in their attempt to provide an adequate PF&D allowance. The simplest method of providing an adequate PF&D allowance is described above, the 50- or 51-minute hour. However, the WHI may encounter more complex methods. One distinction the WHI should note is the difference between an *allowance factor* and an *allowance percentage*. Much confusion results when employers mistakenly use the two interchangeably.

(1) *Allowance factor*

An allowance factor represents a formula used by employers to provide the allowance percentage in their time studies.

(2) *Allowance percentage*

An allowance percentage takes into account that *portion* of the total time available for work that is not actively productive due to the worker's personal time (*e.g.*, breaks), fatigue, and unavoidable delays. Unavoidable delays include anything that prevents the worker from working (*e.g.*, waiting for materials, equipment breakdowns, socializing, etc.). The 9 or 10 minutes an hour PF&D required by the regulations equates to 15 percent (*i.e.*, 9 minutes divided by 60 minutes) or 16.67 percent (*i.e.*, 10 minutes divided by 60 minutes) of an hour respectively.

**(d) Allowance factor**

A 9-minute PF&D allowance is equivalent to 15 percent of an hour and a 10-minute allowance is equivalent to 16.67 percent of an hour. However, employers sometimes attempt to satisfy the PF&D requirement by using *allowance factors* of 1.15 or 1.1667 as equivalents to 9- or 10-minute *allowance percentages*. Use of either of these allowance factors results in an overstatement of the normal expected productivity of the worker who does not have a disability.

- (1) The following example demonstrates how using an *incorrect* allowance factor unfairly reduces the wages of a worker paid a subminimum wage.

Scenario:

Suppose that it takes 10 seconds for an individual without a disability to perform an assembly process. The 10 seconds per assembly would be the standard time to perform the process. The employer wishes to add a 15 percent allowance to the standard time to account for PF&D. Some work center employers will multiply the standard time by an allowance factor of 1.15 thinking they are providing the 15 percent PF&D allowance. This has the effect of changing the standard time to 11.5 ( $10 \times 1.15$ ) seconds per assembly. When 3,600 seconds (*i.e.*, 60 minutes) is divided by 11.5 seconds per assembly, the result in normal expected productivity is 313.04347 assemblies per hour.

However, suppose that, instead, 3,060 seconds (*i.e.*, 51 minutes) is divided by 10 seconds per assembly. The result is 306 assemblies per hour, a difference of 7.04347 assemblies per hour. Multiplied by the number of hours worked per day, days per week, and weeks per year, this error would result in a significant loss of wages to the worker with a disability performing the assemblies.

- (2) The *correct* allowance factor for a 51-minute hour (*i.e.*, a 9-minute, or 15 percent, allowance) is actually 1.1764705, computed as follows:

$$60 \text{ minutes} \div (60 \text{ minutes} - 9 \text{ minutes}) = 1.1764705$$

Continuing the same example, if the employer multiplies the standard time of 10 seconds per assembly by the correct allowance factor of 1.1764705 (representing a 9-minute, or 15 percent, allowance), the result is 11.764705 seconds per assembly. Dividing 3,600 seconds (*i.e.*, 60 minutes) by 11.764705 seconds results in 306.00002 units per hour. Thus, the requirement of providing a 15 percent PF&D allowance has been met.

- (3) The same logic applies when an employer claims to have given an allowance of 10 minutes per hour by applying a factor of 1.1667 to the standard time of the worker who does not have a disability. The correct allowance factor for a 10-minute PF&D, or 16.67 percent of an hour, allowance is *not* 1.1667, but 1.20, computed as follows:

$$60 \text{ minutes} \div (60 \text{ minutes} - 10 \text{ minutes}) = 1.2$$

- (4) Summary of correct PF&D allowance factors:
    - a. For a correct PF&D allowance of 9 minutes an hour, multiply the standard *time* of the worker who does not have a disability by 1.1764705 (may be rounded to 1.1765).
    - b. For a correct PF&D allowance of 10 minutes an hour, multiply the standard *time* of the worker who does not have a disability by 1.2.
  - (5) Common errors involving allowance factors. Two incorrect figures employers use as allowance factors are 1.1667 and 1.15. The faulty reasoning behind these errors is:
    - a. Since 9 is 15 percent of 60, multiplying the standard time by 1.15 is mistakenly considered the same as giving a 9-minute allowance.
    - b. Since 10 is 16.67 percent of 60, multiplying the standard time by 1.1667 is mistakenly considered the same as giving a 10-minute allowance.
- (e) **Allowance percentage**

The WHI must also ensure that the allowance percentages, when used, comply with the requirement for a PF&D allowance. These are also acceptable when done correctly.

- (1) For a PF&D allowance of 9 minutes:

Use 85 percent (*i.e.*, 100 percent minus 15 percent). 85 percent of 60 minutes is 51 minutes.

Multiplying the number of *units* produced in 60 minutes by 85 percent (*i.e.*, giving an allowance percentage of 85) will yield a 9-minute PF&D allowance.
- (2) For a PF&D allowance of 10 minutes:

Use 83.33 percent (*i.e.*, 100 percent minus 16.667 percent). 83.33 percent of 60 minutes is 50 minutes.

Multiplying the number of *units* produced in 60 minutes by 83.33 percent (*i.e.*, giving an allowance percentage of 83.33) will yield a 10-minute PF&D allowance.
- (3) The accuracy of using an *allowance percentage* to provide for PF&D can be demonstrated using the same starting point as the example above: the production standard is 10 seconds per unit and the employer wishes to give an allowance of 9 minutes. In 1 hour (*i.e.*, 3,600 seconds), 360 units will be produced. Multiplying 360 by a percentage factor of 85 percent yields an expected production rate of 306 units per hour. This is the same amount as in the example above when the 1.1764705 allowance factor was used. Thus, using either the correct allowance factor or the correct allowance percentage will yield the same accurate PF&D.
- (4) Use of any percentage allowance greater than 85 percent results in a PF&D allowance that is less than 15 percent, and so is not in compliance.

**(f) Simpler alternatives for allowing for an appropriate PF&D**

The following, which have been discussed above, are two easier ways of computing PF&D. If employers have had difficulty with other methods of figuring the allowance, the WHI may wish to explain these methods as possible alternatives:

- (1) Divide 3,060 seconds (*i.e.*, 51-minute hour) by the standard for workers who do not have disabilities (seconds per unit) and this will allow for a 9-minute PF&D. To allow for a 50-minute hour, divide 3,000 seconds by the standard for workers who do not have disabilities.
- (2) Simply conduct a 50- or 51-minute time study. Or, conduct a 25-minute time study and multiply by 2 (yields a 50-minute hour). To yield a 51-minute hour, conduct a 25½-minute study and multiply by 2.

**64i02 Use of jigs in time studies.**

- (a) There are circumstances where modifications (*e.g.*, jigs or fixtures) must be used to accommodate the special needs of workers with the most severe disabilities, or to help them be more productive. A separate time study does not have to be made utilizing these special modifications. Generally, if a jig would increase the productivity of a worker with a disability, yet impede the work of the worker who does not have a disability, the WHI will not question the standard setter's use or non-use of the jig during the time study (*see* 29 CFR 525.12(h)(2)(iii)).
- (b) The following is an example of the use of a jig. A worker who does not have a disability is able to pack a specific number of items in a fishing gear box without having difficulty counting the quantities (*i.e.*, 4 swivels per box, 10 hooks per box, and 9 weights per box). The worker who does not have a disability picks up the correct quantities and places them in the box without difficulty. Some workers with disabilities, however, are unable to determine the difference between the quantities and must use a counting or matching jig. One type of jig allows the workers with disabilities to put one weight into each of nine slots on the jig, and the worker is taught not to put any weights into the box until all nine slots are filled.
  - (1) Because use of these counting jigs would impede the production of the worker without a disability, they need not be used in the time study.
  - (2) However, as in the example above, the employer has the option of conducting a second time study in which the worker who does not have a disability uses the jig, because this would have the effect of increasing the wages of the worker with a disability. In this situation, the employer would be paying more than the law requires.



**64j ESTABLISHING OBJECTIVE STANDARDS FOR HOURLY PAY RATES****64j00 General.**

- (a) See FOH 64g06 for what to do if the prevailing wage was an hourly rate that the employer wishes to convert to a piece rate when paying the workers with disabilities.
- (b) Some employers may have used pre-established (*i.e.*, off-the-shelf) industrial standards in lieu of conducting a time study. These are typically too general to use when setting the standard for workers who do not have disabilities. If pre-existing industrial standards are adopted as the measure of production for the workers who do not have disabilities, they must be verifiable and reflect the work methods used by the workers with disabilities.
- (c) Some general principles involving time-based measurements of hourly paid workers with disabilities include:
  - (1) Initial evaluation of worker's productivity must be made within the first month after employment.
  - (2) Results of productivity evaluation should be recorded and the worker's wages adjusted retroactively not later than the first pay period following the initial evaluation.
  - (3) A review of worker's productivity must be made at least every 6 months thereafter.
  - (4) Time-based measurements should not be conducted before the worker has time to become familiar with the job.
  - (5) Evaluations shall not be done when a worker is fatigued or subject to conditions that will result in less than normal productivity.
  - (6) Just as it is recommended that either three different standard setters be timed or that the same standard setter be timed three different times and the results averaged, the worker with the disability should also be timed on three different occasions and the results averaged.
  - (7) There are some hourly paid jobs that do not lend themselves to complete time-based measurement because the entire job cycle is too long, or because the amount of work depends upon the actions of others.
    - a. For example, a janitorial job often involves cleaning at a number of different sites with different cleaning tasks over the course of a week; or the bagging of groceries at a supermarket and policing the dining room at a fast food restaurant depend upon the number of customers and the products they buy.
    - b. An acceptable way to objectively evaluate a worker's productivity would be to set up a standardized job simulation. Using the techniques described in FOH 64j00(e)(4) below, time a standard setter(s) and the worker with a disability in the simulated setting.

- (d) The following is a summary of the steps an employer shall follow when conducting *a time-based measurement when the prevailing wage survey indicated that workers were paid by the hour, not by the piece, and the employer wishes to pay a commensurate hourly rate*. A detailed description of these steps is contained in FOH 64j00(e) below.
- (1) Develop a job description.
  - (2) Perform a task analysis that includes both quality and quantity standards.
  - (3) Select the worker(s) who do not have disabilities to be timed (*i.e.*, the standard setter(s)).
  - (4) Time the worker who does not have disabilities performing the job. This sets the standard of productivity (*i.e.*, quantity and quality) of the worker who does not have disabilities for the job.
  - (5) Time the worker with a disability performing the job. This sets the level of productivity (*i.e.*, quantity and quality) of the worker with a disability.
- (e) The employer should have completed all these steps in FOH 64j00(d) above. They are discussed in more detail below. When reviewing an employer's time studies, the WHI should verify that, at a minimum, the employer completed the steps below that are in *Italics*. These are also the same requirements the WHI must follow when conducting his or her own time study or observing a new time study conducted by the employer, either because none was done previously, or to confirm the results of the employer's earlier study.
- (1) *Develop a description of the work to be performed:*
    - a. *Define specific job duties, responsibilities, and general tasks.*
    - b. List the types of skills, training, or experience required.
    - c. Indicate the days and times the work is performed if such factors could have an impact of the productivity of the worker.
    - d. Indicate to whom the worker reports.
  - (2) *Perform a task analysis:*
    - a. *Identify the components, tasks, and subtasks to be performed.*
    - b. *Develop an accurate picture of the method and procedures used to accomplish the tasks.*
    - c. *Include types of equipment and supplies to be used.* Specify the area, location, floor, building, and the like, where the work is to be performed.
    - d. *Establish the minimum acceptable quantity and quality standards for the job.* These standards must be realistic and achievable by the worker who does not have a disability while working at a normal pace that could be comfortably sustained throughout an entire work shift. These standards could be based on the historic on-the-job performance of workers who do not have a disability.



- e. *Determine a definite start and stop point.* The start point is the action that begins the job cycle, such as getting out a mop and bucket. The stop point for an hourly job is the action that completes the job, such as putting the mop and bucket away. *See FOH 64j01 if the tasks are dissimilar.*
  - f. *Note the methods and procedures that will be used by the worker who does not have a disability when establishing the standard so that they are the same when the worker with a disability is evaluated.* When the worker with the disability performs the actual work, it must be performed in the same way the standard setter performed the work when establishing the standard, or in a way that allows the worker with a disability to be more productive (*see FOH 64i02 for use of jigs in time studies*).
  - g. *Make certain that the task analysis is an accurate description of the work, and is the way the work is actually accomplished.*
- (3) *Select the person(s) who does not have a disability to perform the work (i.e., the standard setter(s)). This will usually be an employee who does not have a disability or a staff member(s) who is:*
- qualified to perform the task;
  - familiar, experienced, and comfortable with the work;
  - able to perform in a typical work environment;
  - able to maintain a consistent and efficient pace; and
  - able to perform at or close to 100 percent productivity.
- (4) *Time the worker who does not have a disability (i.e., the standard setter) performing the job:*
- a. This is known as setting the standard.
  - b. *The individual conducting the study (i.e., the observer) must:*
    - 1. *Assure that the standard setter performs the task exactly as it will be performed by the worker with a disability.*
    - 2. *Compare the standard setter's actions to the written procedures.*
    - 3. *Structure the study to avoid, as much as possible, lost time situations.* “Lost time” is a term used by NISH that the WHI may find on time study documents. Lost time is time excluded from a time study for an activity that is not a regularly recurring part of the job (*e.g.*, time lost when a supervisor acting as the standard setter is interrupted during the time study by an employee's question).
    - 4. *Time the standard setter's work using the same start and stop times as designated earlier.*

5. *Read the stopwatch and make recordings.*
6. *Document the measurement used to set the standard.*
7. *Conduct the study three times and determine average time.* It is recommended that either three different standard setters be timed, or that the same standard setter be timed three different times and the results averaged. When possible, use three different people as standard setters. Using three different people allows for the fact that different people normally work at different paces.

(5) *Time the worker with a disability performing the job.* Evaluate the performance of the worker with a disability following the procedures discussed in FOH 64j02.

- (f) The WHI should verify that the steps discussed in FOH 64j00(e) above were taken, and especially note whether the employer included rework time when setting the standard. The importance of the employer's treatment of rework time is explained below in 64j02(b)(1).

**64j01 How to determine a single commensurate hourly rate when the work involves dissimilar tasks.**

- (a) Many hourly paid jobs are composed of dissimilar tasks. In such a situation, if the employer wishes to evaluate an employee on each task, the following steps must be taken. They are the same whether conducted by the employer or the WHI.

- (1) Subdivide the job into its component tasks.
- (2) Time the standard setter(s) to determine the length of time spent in each component task.
- (3) Note the ratio of time spent by the standard setter in each component task to the time taken to complete all of the tasks (*i.e.*, the job as a whole).
- (4) Time the worker with a disability.
- (5) Rate the productivity of the worker with a disability.

- (b) See the following example of janitorial work for a demonstration of this method.

- (1) *Subdivide the job into its component tasks.* Assume that a particular janitorial position requires that the employee move furniture, vacuum, mop, and empty trash. Assume that each of these tasks requires different skills.
- (2) *Time the standard setter(s)* to determine the length of time spent in each component task. This may be done by a stopwatch measurement or any other established industrial work measurement technique.

*Note the ratio* of time spent in each individual task to the time spent in performance of the total job to determine the percentage of time each task takes. In this example, assume that the worker who does not have a disability (*i.e.*, the standard setter)

spends 25 percent of his or her time in each of the four component janitorial tasks mentioned above.

- (3) *Time the worker with a disability.* To ensure that the standard setter and the worker with a disability perform at levels that can be sustained throughout the workday, it is recommended that they be studied three times, for at least 30 minutes, ideally at different times of day. Time studies of a shorter duration often result in unrealistic productivity rates that cannot be sustained throughout the workday.
- (4) *Rate the worker with a disability's productivity* by following these steps:
- a. Divide the standard setter's time by the time of the worker with a disability to get a percentage rating of that worker's productivity in each task. In the following example, assume that the standard is based on the average time of three workers who do not have disabilities, and the time for the worker with disabilities is the average of three different tests (*see* FOH 64j01(b)(4)).
  - b. Multiply this percentage by the percentage of time that each component took the standard setter. In this example it was determined that each task took 25 percent of the standard setter's total time. This results in a new productivity percentage for each task.
  - c. Total the four percentages obtained in the previous step.
  - d. Multiply this percentage by the prevailing wage to get the commensurate rate.
- (c) The calculations for the above example are demonstrated, step by step, below:
- Study 1: In this example, you find that moving furniture takes the worker who does not have a disability 40 minutes and the worker with a disability 65 minutes:
 
$$40 \div 65 = 61.5\% \text{ (or } 0.615)$$

$$0.615 \times 25\% = 15.4\% \text{ (or } 0.154) \text{ (25 percent of the total was the percentage of time taken by each task)}$$
  - Study 2: Vacuuming takes the worker who does not have a disability 38 minutes and the worker with a disability 50 minutes:
 
$$38 \div 50 = 76\% \text{ (or } 0.76)$$

$$0.76 \times 25\% = 19\% \text{ (or } 0.19) \text{ (25\% of the total was the percentage of time taken by each task)}$$
  - Study 3: Mopping also takes the worker who does not have a disability 38 minutes and the worker with a disability 50 minutes:
 
$$38 \div 50 = 76\% \text{ (or } 0.76)$$

$$0.76 \times 25\% = 19\% \text{ (or } 0.19) \text{ (25\% of the total was the percentage of time taken by each task)}$$

- Study 4: Emptying trash cans takes the worker who does not have a disability 30 minutes and the worker with a disability 60 minutes:

$$30 \div 60 = 50\% \text{ (or } 0.50\text{)}$$

$$0.50 \times 25\% = 12.5\% \text{ (or } .125\text{)} \text{ (25\% of the total was the percentage of time taken by each task)}$$

- Next, *total the results* of each of the individual studies:

$$\text{Study 1} + \text{Study 2} + \text{Study 3} + \text{Study 4} = \text{Total for job}$$

$$0.154 + 0.19 + 0.19 + 0.125 = 0.659$$

In the above example, the work performed by the worker with a disability met the minimum acceptable quality standards established for the job. Based on the quantity of work performed, the worker with a disability is about 66 percent (65.9 percent) as productive as the worker who does not have a disability. So if the prevailing wage were \$7.00 per hour, the commensurate wage would be \$4.613 ( $\$7.00 \times 0.659$ ).

## 64j02

### **Quantity and quality when computing hourly commensurate wages.**

- (a) FLSA section 14(c)(1)(B) and 29 CFR 525.12(d) require that the subminimum 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.
- (b) The following are two methods that employers can use to ensure that they take both quality and quantity of work into consideration when computing hourly commensurate wages.
  - (1) *Rework*
    - a. Rework is perhaps the simplest method of evaluating the performance of workers from both a quality and quantity standpoint. It requires that the employer accurately define both the minimal acceptable quantity standard (*i.e.*, amount of work) and the minimal acceptable quality standard before workers are evaluated.
    - b. Once these standards are defined, the worker who does not have a disability is then subjected to a time study. When the worker indicates that he or she has satisfactorily completed the work, the clock is stopped, time is recorded, and work product is examined by the individual(s) conducting the study to ensure that the worker has met, at least, the minimum acceptable pre-established quantity and quality standards.
      1. If the minimum acceptable standards have been met, the time as recorded is the standard by which the work of the worker with a disability is compared to establish the commensurate wage rate.
      2. 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 and/or 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.

- c. 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. When the worker indicates that he or she has satisfactorily completed the work, the clock is stopped, time is recorded, and work product is examined by the individual(s) conducting the study to ensure that the worker has met, at least, the minimum acceptable pre-established quantity and quality standards.
1. If the minimum acceptable quality and quantity standards have been met, the time as recorded is then compared to that of the standard setter (*i.e.*, the worker who does not have a disability). The percentage yielded by this comparison is then applied to the prevailing wage in order to determine the commensurate wage.
  2. 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 and/or 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 and compared to that of the standard setter (*i.e.*, 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.
- d. When using the *rework* methodology, 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.
1. These standards must be predetermined, written, and clearly articulated to the workers before the time studies are conducted.
  2. Examples of quality standards for hourly paid jobs could include:
    - The number of streaks left on a mirror or window to be cleaned by a janitor
    - The amount of waste paper remaining in a waste basket to be emptied by a custodian
    - The number of pieces of mail that were incorrectly sorted by a mail room attendant
    - How many patches of un-cut grass remain on a lawn being mowed by a landscape worker

- e. When possible, use three different people as the standard setter. Although 29 CFR 525 does not specifically require timing three different people, using three different people allows for the fact that different people normally work at different paces.

(2) *90/10 Rating*

Although *not required* by the regulations, one method of measuring quality that the WHD has accepted when determining an hourly commensurate rate is a technique known as the 90/10 Rating. Various forms have been created by employers and interested parties that assist them in performing the 90/10 Rating. Although the WHD has not officially reviewed and approved any of these forms, the WHD accepts their use when properly completed. Although the 90/10 methodology was designed to be used when rework is not included in the time studies, some employers still choose to use the 90/10 even after including rework. In these situations, the WHD accepts this practice as long as there is no deduction from the quality rating because it is to the benefit of the worker with a disability.

- a. Under the 90/10 Rating, the standard setter *must* perform up to the pre-established minimum acceptable quality and quantity standards when being time studied. If he or she does not, the employer must either re-define the standards to comport with the performance of the worker without a disability or conduct another time study.
- b. Under this method, a 90 percent rating factor is assigned to the quantity of work performed and a 10 percent rating factor assigned to quality of the work performed. Time studies are conducted, under identical circumstances, to determine the productivity, both in terms of quality and quantity, of both the worker who does not have a disability and the worker who has a disability.
  - 1. To determine the worker with a disability's quantity rating, the employer must first compare the quantity of work performed by the worker with a disability to that of the standard setter (*i.e.*, the worker who does not have a disability). This figure is then multiplied by 90 percent.
    - A. A very simple example might be that the minimum acceptable number of wastebaskets to be emptied by a custodian in 30 minutes, as confirmed by the time study of the standard setter, is 20. If the worker with a disability empties 15 during the 30-minute time study, that worker has an initial quantity rating of 75 percent (*i.e.*, 15 divided by 20). When this is multiplied by 90 percent, the final quantity rating is 0.675 or 67.5 percent.
    - B. When determining the worker with a disability's quantity rating, the employer must arrive at that rating by evaluating the worker *only* on the job components actually performed. The work measurement method of breaking down a job into its components, and then rating the worker on each individual component, is referred to as *factoring*. The

employer may only rate the worker on the components actually performed and may not penalize a worker because he or she fails to perform, or is incapable of performing, a certain component(s) of the job.

*Factoring* is not an acceptable work sampling method when the employer rates a worker on job components the employee cannot or will not perform. For example, a job description may require that a groundskeeper perform the following tasks: picking up trash, sweeping the sidewalk, and operating a power-driven lawn mower. If the employer hires a worker with a disability who can and does pick up trash and sweep the sidewalk, but, for whatever reason, does not operate the lawn mower, the employer must rate that employee only on picking up trash and sweeping the sidewalk. Some employers may attempt to assign a rating of 33⅓ percent to each of the three components, and then, in order to arrive at a total score, add the ratings awarded the employee for his or her performance of each of the three components. In this example, the employer may not penalize the employee for not operating the lawn mower. The employer would be improperly factoring if he or she included a rating of zero for operating the lawn mower in the employee's rating. Such factoring would significantly reduce the employee's rating, and thus, his or her commensurate wages for the work he or she performs.

2. To determine the worker with a disability's quality rating, the employer must compare the quality of the work performed by the worker with a disability to that of the work performed by the worker who does not have a disability. This figure is then multiplied by 10 percent.

Continuing with the example above, if the quality standard was that no more than four wastebaskets may have any debris remaining in them after being emptied, and the worker with a disability leaves debris in only one of the wastebaskets, the initial quality rating would be 100 percent. This figure is then multiplied by 10 percent to arrive at the final quality rating of 10 percent.

Note: had the worker with a disability left debris in five of the wastebaskets, the employer would be allowed to assign a lower initial quality rating based on an objectively pre-determined scale.

- c. The employer then adds together the final quality and quantity ratings that were obtained for the worker with a disability. This is then multiplied by the prevailing wage to obtain the commensurate wage rate of the worker with a disability.

Again, using the example above, the evaluation of the work performed by the worker with a disability yielded a total final rating of 77.5 percent (*i.e.*, 67.5

percent for quantity plus 10 percent for quality). If the prevailing wage for the job being performed is \$6.50 per hour, the commensurate rate would be \$5.0375 or \$5.04 per hour (77.5 percent multiplied by \$6.50 per hour yields \$5.0375 per hour).

- d. WHIs may encounter employers who have modified the standard 90/10 Rating form to assign a higher rating to quality. The form may assign ratings of 80/20, 70/30, etc. The WHD does not automatically accept such adjustments to the 90/10 Rating, and employers must be able to document that a higher quality rating is warranted. WHIs should contact the regional enforcement coordinator: section 14, through established procedures, when encountering a modified 90/10 Rating.

**64j03 Fatigue considerations and hourly commensurate rates.**

- (a) 29 CFR 525.12(j)(3), which provides instructions for calculating hourly rates, states that evaluations of workers paid on an hourly basis *should not be conducted* if the worker is “fatigued or subject to conditions that result in less than normal productivity.” No PF&D allowance is required when setting commensurate hourly rates because hourly workers must be paid for the short breaks and downtime that would be accounted for by such an allowance. The use of a PF&D allowance is required by 29 CFR 525.12(h)(2)(ii), *only when calculating piece rates*.
- (b) The WHD finds time studies acceptable when the worker is observed and rated under a simulation of actual work conditions, is rested and not fatigued, and has taken care of personal needs, and when there are no undue disruptions, delays, or interference.
- (c) However, in light of 29 CFR 525.12(j)(3), the employer *may choose* to include a PF&D allowance if the worker cannot be evaluated under the conditions just described, or because the employer wishes to pay workers with disabilities wages that exceed the applicable commensurate wage rate.



**64k**      **ADDENDUM**

**64k00**      **Glossary.**



**64k01**     **Application for Authority to Employ Workers with Disabilities at Subminimum Wage (WH-226).**



**64k02**     **Sample letters.****(a)**     **Sample appointment letter**

The following is an example of an appointment letter that WHIs can adapt depending on the particular assignment. FOH 64f01 directs WHIs to send section 14(c) employers an appointment letter prior to visiting the establishment to ensure the presence of the executive director and facilitate the examination of necessary documentation.



**(b) Letter of Findings**

A Letter of Findings shall be sent to the employer at the conclusion of each section 14(c) investigation to advise the employer in writing of the issues discussed and agreements reached during the final conference (*see* FOH 64h01(e)).

- (1) The Letter of Findings should:
  - a. state the period of investigation;
  - b. list violations found for staff employees separately from those for clients;
  - c. list the violations by act, specify the types of violation under each act, and mention the number of employees affected and amount of back wages due;
  - d. provide the citation in 29 CFR 525, or other appropriate regulation, for each of the violations found;
  - e. include a section of comments and recommendations to assist the employer's future compliance;
  - f. when appropriate (*e.g.*, when the WHI still has some questions regarding the employer's efforts to come into compliance), the employer shall be asked to respond to the Letter of Findings. He or she should be directed to send a letter to the DO, within 30 days of the date of the Letter of Findings, describing the steps and/or changes that have been taken since the conclusion of the investigation to come into compliance and assure compliance for the future.
- (2) Sample Letter of Findings