



Administrator's Interpretation No. 2016-2

November 17, 2016

Issued by ADMINISTRATOR DAVID WEIL

SUBJECT: Effect of state laws prohibiting the payment of subminimum wages to workers with disabilities on the enforcement of section 14(c) of the Fair Labor Standards Act.

This Administrator's Interpretation provides guidance regarding the impact of state laws that prohibit the payment of subminimum wages to workers with disabilities on the enforcement of section 14(c) of the Fair Labor Standards Act (FLSA). Employers paying subminimum wages to workers with disabilities under a section 14(c) certificate must pay these employees in accordance with both Federal and state laws. The issuance of a certificate under the provisions of section 14(c) of the FLSA does not excuse noncompliance with any state law establishing higher minimum wage requirements.

I. Background

The Secretary of Labor is authorized to administer and enforce section 14(c) of the FLSA, which provides that "to the extent necessary to prevent curtailment of opportunities for employment, [the Secretary] shall" issue certificates permitting employers to pay subminimum wages to workers who have disabilities for the work to be performed. 29 U.S.C. 214(c). The regulations interpreting FLSA section 14(c) explain the certificate application process and the requirements for payment of subminimum wages under a certificate. See 29 CFR part 525.¹ Subminimum wage rates permitted by section 14(c) must be based on the prevailing wage for the job and must be commensurate with the worker's productivity as compared to the productivity of an experienced worker who is not disabled for the work to be performed. Under contracts with the Federal Government subject to the McNamara-O'Hara Service Contract Act (SCA) and the Walsh-Healy Public Contracts Act (PCA), employers with section 14(c) certificates are permitted to pay wages that are lower than the applicable prevailing wage under the contract to workers who have disabilities for the work to be performed.²

¹ Additional information, including Fact Sheets, the Field Operations Handbook, and online wage calculators, is available at <http://www.dol.gov/whd>.

² Importantly, SCA-covered contracts that result from solicitations issued on or after January 1, 2015, are subject to Executive Order 13658. The Executive Order establishes that workers with disabilities whose wages are governed by section 14(c) certificates generally must be paid at least the Executive Order minimum wage (i.e., \$10.15 in 2016) for all time spent performing on or in connection with covered contracts. The Executive Order is discussed in greater detail below.

II. The FLSA Does Not Preempt a State Law That Prohibits the Payment of Wages Lower Than the State’s Minimum Wage

Both the FLSA and the corresponding regulations allow states to establish a higher minimum wage rate than the rate set by the FLSA. Specifically, section 18(a) of the FLSA provides that “[n]o provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter” 29 U.S.C. 218(a). Section 18(a) expressly states that the FLSA does not preempt a state law provision that requires payment of a higher minimum wage than that required under the FLSA. *See, e.g., Pac. Merch. Shipping Ass’n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990), *cert. denied*, 504 U.S. 979 (1992). In other words, “the purpose behind the FLSA is to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA.” *Id.*

Moreover, the Department’s regulations interpreting section 14(c) contemplate that a state may adopt its own standards and prohibit the payment of subminimum wages to workers with disabilities. The regulations specifically provide that “[n]o provision of these regulations, or of any special minimum wage certificate issued thereunder, shall excuse noncompliance with any other Federal or State law or municipal ordinance establishing higher standards.” 29 C.F.R. 525.20

Thus, because the FLSA allows states to establish higher requirements, section 14(c) does not preempt a state law prohibiting the payment of wages less than the state minimum wage to workers with disabilities. The FLSA establishes a national minimum wage floor, and section 14(c) provides the requirements for payment of a commensurate wage rate lower than that floor to certain workers with disabilities to the extent necessary to prevent curtailment of opportunities for employment. States may raise the minimum wage floor by prohibiting payment of a wage lower than the state’s minimum wage to some or all workers with disabilities. States may do this in several ways, including by express prohibition of the payment of wage rates lower than the state minimum wage or by not exempting certain employees from the state’s minimum wage requirement.³

The FLSA therefore does not excuse an employer from compliance with more protective standards required under state law. 29 U.S.C. 218(a); 29 C.F.R. 525.20. If an employer has been issued a section 14(c) certificate authorizing payment of commensurate wage rates below the federal minimum wage to its eligible workers with disabilities, the employer must nevertheless comply with any applicable state law requiring the payment of a state minimum wage rate that is higher than the commensurate wage rate applicable to each worker covered by the section 14(c) certificate.

³ For example, in 2015, the State of New Hampshire enacted a state law that prohibits payment an hourly wage rate less than the state’s minimum wage to workers with disabilities. See 2015 N.H. Laws Ch. 40 (S.B. 47) (effective July 6, 2015).

III. Issuance of FLSA Section 14(c) Certificates in States That Prohibit the Payment of Subminimum Wages

WHD reviews section 14(c) certificate applications on a case-by-case basis. In states that prohibit payment of subminimum wages to workers with disabilities, WHD may issue section 14(c) certificates, where appropriate, if the employer demonstrates a reasonable basis for the use of a certificate that does not conflict with the requirements of the applicable state law. WHD recommends that employers contact their appropriate state authority for guidance on the requirements of state law.

In a state that requires the payment of no less than the state minimum wage to workers with disabilities, there may be circumstances in which a section 14(c) certificate holder may pay commensurate wage rates to workers with disabilities under the certificate and remain in compliance with state law. For example, a section 14(c) certificate may have a lawful use (i.e., an employer may be able to pay commensurate wage rates) in a state that prohibits the payment of wage rates lower than the state minimum wage if the certificate holder has a contract with the Federal Government that is covered by the SCA.

Under an SCA-covered contract, the specified wage rate for the contract may be higher than the federal or state minimum wage. Under a section 14(c) certificate, workers with disabilities employed on SCA-covered contracts therefore may be paid commensurate wage rates lower than the applicable SCA prevailing wage rate as long as the commensurate wages are higher than the state minimum wage. The payment of workers with disabilities on these contracts at commensurate wage rates lower than the prevailing wage would require a section 14(c) certificate but may not constitute a violation of a state law prohibiting employers from paying wages below that state's minimum wage.

Example: The state law requires payment of at least the state minimum wage of \$8.00 per hour to all employees, including workers with disabilities. The section 14(c) certificate holder has an existing SCA-covered contract that was entered into before January 1, 2015, and the applicable SCA prevailing wage rate is \$15.00 per hour.⁴ Under a valid section 14(c) certificate, the employer may pay commensurate wage rates below \$15.00 per hour to a worker who has a disability for the work to be performed; however, the commensurate wage rate must not be less than the state's minimum wage of \$8.00. If a worker with a disability was determined to complete the job at 40% productivity through the process defined by section 14(c) and its regulations, the commensurate wage rate would be \$6.00 per hour. Nevertheless, under the state law, the rate paid to the worker must be at least the state minimum wage of \$8.00 per hour. If, however, a worker with a disability was determined to complete the job at 65% productivity, the commensurate wage rate would be \$9.75 per hour, which would be in compliance with both the state law and the FLSA.

⁴ As explained in footnote 2 above, SCA-covered contracts entered into prior to January 1, 2015 are generally not subject to Executive Order 13658. An explanation of the Executive Order and an example applying it are found on page 4..

In addition, Executive Order 13658, signed by President Obama on February 12, 2014, raised the hourly minimum wage to \$10.15 beginning January 1, 2016 for workers performing on or in connection with Federal Government construction and service contracts. The wage rate under the Executive Order may increase annually based on inflation.⁵ Executive Order 13658 applies to new contracts and replacements for expiring contracts with the Federal Government that result from solicitations issued on or after January 1, 2015, or to contracts that are awarded outside the solicitation process on or after January 1, 2015.⁶ The Executive Order specifically provides that workers whose wages are calculated pursuant to section 14(c) certificates are generally entitled to receive no less than the Executive Order minimum wage for all time spent performing on or in connection with contracts covered by the Order. If a worker is entitled to a wage rate higher than the Executive Order minimum wage pursuant to another federal, state, or local law, or if the commensurate wage rate under a section 14(c) certificate is higher than the Executive Order minimum wage, the worker must be paid the highest wage rate. The Executive Order minimum wage is a wage “floor” and it does not excuse noncompliance with any applicable higher wage obligations under other federal, state, or local laws.

Example: The state requires payment of at least the state minimum wage of \$8.00 per hour to all employees, including workers with disabilities. The section 14(c) employer has an SCA-covered contract that is subject to Executive Order 13658, which, in 2016, requires payment of no less than \$10.15 per hour to workers performing on or in connection with covered contracts who are paid at commensurate wage rates under a section 14(c) certificate. The applicable SCA prevailing wage rate under the contract is \$15.00 per hour. The employer may pay a commensurate wage rate below \$15.00 per hour to a worker who has a disability for the work to be performed and is covered by the section 14(c) certificate; however, the commensurate wage rate must not be less than the Executive Order minimum wage. If a worker with a disability was determined to complete the job at 60% productivity through the process defined by section 14(c) and its regulations, the commensurate wage rate would be \$9.00 per hour. Even though this rate is higher than the state minimum wage, the rate paid to the worker must be at least the 2016 Executive Order minimum wage rate of \$10.15 per hour.

IV. Conclusion

It is the Administrator’s interpretation that state laws that prohibit the payment of subminimum wages to workers with disabilities, and thus create a higher minimum wage than the Federal minimum wage requirement for those workers, do not conflict with the FLSA. WHD will consider each application for a section 14(c) certificate on a case-by-case basis. WHD may issue a section 14(c) certificate in a state that prohibits the payment of subminimum wages to workers with disabilities where the employer demonstrates a reasonable basis for the use of a certificate that does not conflict with the requirements of the applicable state law. Employers must comply with both state and Federal laws; therefore, the issuance of a certificate does not excuse an employer’s failure to comply with the applicable state law.

⁵ Given the potential complexity of employment relationships, aspects of both horizontal and vertical joint employment may be present in a single joint employment relationship. For example, both forms of joint employment could potentially exist where two warehouses share employees and use a staffing agency to provide them with labor.

⁶ Additional guidance on Executive Order 13658 is available at <http://www.dol.gov/whd/flsa/eo13658/>