



## **A GUIDE FOR REVIEWING AND ADJUSTING COMMENSURATE WAGE RATES UNDER SECTION 14(C) OF THE FAIR LABOR STANDARDS ACT, REQUIRED AS A RESULT OF THE JULY 24, 2009 INCREASE IN THE FEDERAL MINIMUM WAGE**

*Section 14(c) of the Fair Labor Standards Act (FLSA) authorizes the employment of workers with disabilities at special minimum wage rates which are less than the federal minimum wage when the disabilities impair the workers' productivity for the jobs being performed. The special minimum wage rates must be based on the prevailing wage rates paid experienced workers in the area. To ensure that workers receive their proper compensation, employers must review the prevailing wage rates paid to experienced workers at least annually and adjust the special minimum wages they pay accordingly. As a result of the Fair Minimum Wage Act of 2007, the federal minimum wage will increase from \$6.55 to \$7.25 per hour on July 24, 2009. This increase will most likely impact prevailing wage rates, therefore, employers are required to review their prevailing wage rates and, if necessary, adjust the special minimum wages (commensurate wages) earned by workers with disabilities. This guide is designed to assist employers in that process.*

### **How can an increase in the minimum wage affect wages being paid to workers with disabilities who are paid special minimum wages?**

The certificate that authorizes an employer to pay special minimum wages and Regulations 29 C.F.R. part 525 require that workers with disabilities receive wages commensurate with those paid experienced workers in the area performing similar work who do not have disabilities that impact their productivity. An increase in the minimum wage will most likely affect the prevailing wage rates paid to experienced workers. In order to assure continued payment of proper commensurate wage rates, employers should review these guidelines and take measures to determine if there is an increase in the prevailing wage rates as close to July 24, 2009 as possible. Merely adjusting prevailing wage rates that are below \$7.25 an hour beginning July 24, 2009 may not be sufficient for compliance under section 14(c) of the FLSA. You must consider all of the appropriate issues discussed here.

### **What if my current computed prevailing wage rates are less than \$7.25 an hour?**

Commensurate wage rates that are based on prevailing wage rates less than \$7.25 per hour will have to be adjusted upward to at least \$7.25 effective July 24, 2009, and you will need to compute commensurate wage rates based on the new (higher) prevailing wage rates from that date forward. The regulation at 29 C.F.R. § 525.10(h) prohibits a prevailing wage rate that is less than the minimum wage specified in section 6(a) of the FLSA. As discussed later in this document, employers may conduct new prevailing wage surveys or simply increase existing prevailing wage rates by 10.6871 per cent.

### **What if my current prevailing wage rates already exceed \$7.25 per hour on July 24, 2009?**

Because the scheduled increases in the FLSA minimum wage will probably impact most prevailing wage rates, including those already greater than \$7.25 per hour, certificate holders will still be required to review, and if necessary adjust, the prevailing wage rates used to determine commensurate wage rates.

### **What if our state minimum wage is higher than the new federal minimum wage?**

If, upon your review, you determine that your applicable state minimum wage was equal to or more than \$7.25 per hour when you conducted the surveys that yielded your most recent prevailing wage rates, and the resulting prevailing wage rates equaled or exceeded that applicable state minimum wage, you need not conduct a new survey at this time.<sup>1</sup> You will be required to conduct a new review when an increase in the state minimum wage occurs or, on the anniversary date of your current prevailing wage survey, whichever occurs first.

*For example, an employer in Massachusetts conducted a prevailing wage survey for janitors on February 2, 2009 and determined that the prevailing wage for that job classification was \$9.50 per hour. Because the Massachusetts State minimum wage at that time was \$8.00 per hour (which is more than \$7.25 per hour) and the prevailing wage exceeded the applicable Massachusetts State minimum wage of \$8.00 per hour, the employer is not required to adjust its current prevailing wage for janitors at this time. The employer would be required to conduct a new prevailing wage survey prior to February 2, 2010 (the anniversary date of the current survey) or when the Massachusetts State minimum wage increases – whichever occurs first.*

### **How do we determine what the new prevailing wage rates are in our area?**

As mentioned above, all prevailing wage rates will need to be reviewed to assess the impact of the increase in the minimum wage. If you are required to adjust your current prevailing wages, your facility should contact the sources from which you originally obtained prevailing wage rate information to determine the effect of the increase of the statutory minimum wage, or, if necessary, obtain this information from new sources. You should wait at least thirty days, but not more

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<sup>1</sup>The following states had, as of May 8, 2009, minimum wages that equaled or exceeded \$7.25 per hour: Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, New Hampshire, New Mexico, Ohio, Oregon, Rhode Island, Vermont, Washington, and West Virginia. The minimum wage of the District of Columbia is \$7.55 per hour.

than sixty days, before obtaining the prevailing wage data to allow for the new minimum wage to impact the prevailing wage rates.

Once you have this information, you should adjust the wage rates of workers with disabilities no later than the next full pay period after the prevailing wage rates are reexamined. The adjustment should be made retroactive to August 23, 2009, thirty days after the date of the increase of the federal minimum wage. As with all prevailing wage surveys, you should also document these contacts and have this information available for review by the WHD. These procedures are required under Regulations, 29 C.F.R. §§ 525.9(b)(2), 525.10, 525.12(f), and 525.16(c) and are discussed in WHD Fact Sheet No. 39B, (*Prevailing Wages and Commensurate Wages under Section 14(c) of the Fair Labor Standards Act (FLSA)*).

**What if we just conducted a survey and it is not convenient to perform a new survey at this time? Is there any alternative method for adjusting commensurate wage rates?**

Yes, you may elect to make a blanket adjustment to prevailing wage rates based on the percentage increase in the statutory minimum wage. This change should be accomplished in the next complete pay period following the minimum wage increase and made retroactive to July 24, 2009, the effective date of that increase. For example, on July 24, 2009, the federal minimum wage will increase from \$6.55 an hour to \$7.25 an hour – an increase of 10.6871 per cent. Your facility may elect to adjust all prevailing wage rates by 10.6871<sup>2</sup> per cent beginning July 24, 2009, and not reexamine prevailing wage rates until your facility would be otherwise required to do so to maintain your authority to pay commensurate wage rates to workers with disabilities.

*For example; if the current prevailing wage rate used is \$7.00 an hour and an hourly paid worker with disabilities paid under a special certificate currently receives one-half of that rate (\$3.50 an hour), you could adjust the prevailing rate to \$7.75 an hour ( $\$7.00 \times 1.106871$ ), raise that worker's commensurate wage rate to \$3.88 an hour (one-half of \$7.75), and meet the requirements of the regulations.*

To make this blanket adjustment to piece rates, simply multiply the existing piece rate by the percentage increase in the minimum wage.

*For example, an existing piece rate is \$0.071, based on a prevailing wage of \$7.10 per hour and time studies which showed that workers without disabilities (the standard setters) were*

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<sup>2</sup> Dividing the increase of \$0.70 by \$6.55 yields 10.68702 per cent. Using WHD's guidance on "rounding" when computing commensurate wages (which requires decimals be carried out to at least the fifth place and then rounded up to four places), an employer would be in compliance if it increased the prevailing wages by 10.6871 per cent. Of course, an employer may always round up earlier than the fifth decimal point and use a percentage of 10.688, 10.69, or even 11.00.

*able to produce 100 widgets in a "fifty-minute" hour, allowing 10 minutes per hour for personal time and fatigue ( $\$7.10$  divided by  $100 = \$0.071$ ). To calculate the new piece rate using the blanket adjustment method, multiply  $\$0.071$  per piece by  $1.106871$  (amount of the increase in the minimum wage). The product yields a new piece rate of  $\$0.0785878$ , or  $\$0.0786$ . It is suggested that your records show that the prevailing hourly rate used to establish the piece rate has been increased by  $10.6871$  per cent. It is also suggested that your records indicate that the new piece rate ( $\$0.0786$ ) is based on the adjusted prevailing wage of  $\$7.86$  ( $\$7868$  divided by  $100 = \$0.0786$ ).*

### **How much time does an employer have to complete this process?**

An employer may not base a commensurate wage rate on a prevailing wage rate that is less than the statutory minimum wage. Therefore, any prevailing wage rates less than  $\$7.25$  per hour must be raised to that level by July 24, 2009 and a new prevailing wage survey must be conducted.

It is anticipated that the "ripple effect" of the increased minimum wage in some cases will not take place immediately. Consequently, we are providing employers, who do not choose to use the blanket adjustment method of calculating commensurate wage rates, with the option of waiting 30 to 60 days after July 24, 2009 before conducting new prevailing wage surveys. Upon completion of the survey process, any increases in prevailing wage rates must be reflected in the commensurate wage rates of workers with disabilities by the next complete pay period. In addition, the increase must be made retroactive to August 23, 2009, thirty days after the effective date of the increase of the federal minimum wage. If a facility decides to increase rates using the blanket adjustment percentage method described above, this should be completed by the next full pay period after the minimum wage increase occurs and must be made retroactive to July 24, 2009, the effective date of the increase of the federal minimum wage.

### **What will happen if these adjustments in wage rates are not completed in a timely fashion?**

All adjustments to prevailing wage rates must be reflected by a corresponding increase to commensurate wage rates. These changes must be made no later than the next full pay period following the reexamination of the prevailing wage rates. Failure to follow these procedures is likely to cause violations of the FLSA and affect the terms and conditions of your certificate authorizing the employment of workers with disabilities at commensurate wage rates. This may also result in the computation of back wages and a request for payment of any back wages due such workers.

**We do McNamara-O'Hara Service Contract Act (SCA) work for a federal agency and base our commensurate wage rates on the wage determination rate required by the contract. Do we need to adjust these rates?**

No. Wages based on a wage determination issued under SCA do not have to be increased unless the wage determination calls for a wage rate less than \$7.25 per hour, the new, increased FLSA minimum wage. In such instances, commensurate wage rates must be based on a prevailing wage rate at least equal to the new statutory minimum wage.

**What about our other workers who do not have disabilities? Do we have to increase their pay also?**

Workers without disabilities for the work to be performed, who are not otherwise exempt, must be paid at least the statutory minimum wage if they are performing work subject to the minimum wage provisions of the FLSA. These workers must receive at least \$7.25 an hour beginning July 24, 2009. This includes both staff members and production workers.

**I have read this Guide and I still have questions. Who can help me with my problems?**

The Section 14 Team Leader who is responsible for your area is available to answer any additional questions you may have. We have attached a list of these specialists and their addresses, phone numbers, and FAX numbers. They will be happy to help you with any problems. In addition, we have included information about our National Certification Team which performs all certification under section 14(c).

### **General Questions and Answers**

**How do I determine "commensurate wage rates?"**

A commensurate wage rate is a special minimum wage paid to a worker with a disability which is based on the worker's individual productivity, no matter how limited, in proportion to the wages and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the geographic area from which the labor force of the community is drawn. An example of a commensurate wage rate would be as follows:

*If an experienced worker who does not have a disability that impairs his or her productivity makes boxes and can produce 40 boxes in an hour, but a worker with a disability can only produce 10 boxes an hour, the worker with a disability is considered 25% as productive as the experienced worker and should receive at least 25% of the prevailing wage rate for such*

*work. If the prevailing wage rate is determined to be \$8.00 an hour, the worker with the disability employed under a special certificate should receive at least 25% of that wage rate or \$2.00 an hour for performing the box production work. This is an extremely simple example but it demonstrates the principle of commensurate wage rates.*

Properly established piece rates yield commensurate wage rates. A piece rate fixes a price on each completed unit of work. This rate is derived by dividing the prevailing wage rate by the average hourly production of individuals not disabled for the work to be performed.

*For example, if three persons who do not have disabilities impairing their productivity for the job each worked one "fifty-minute" hour and produced 270 units in total, the average production would be 90 units per hour (270 units divided by 3 hours). Assuming the test involved unskilled work, and the prevailing unskilled labor rate in the vicinity is \$7.50 per hour, the piece rate would be \$0.0834 (\$0.083333 rounded up) per unit (\$7.50 divided by 90 units). A worker with a disability producing 60 pieces in an hour would earn \$5.004 or \$5.01 for that hour (60 pieces x \$0.0834 = \$5.004).*

### **Where are the requirements for commensurate wage rates found in the federal regulations?**

The requirements for setting commensurate wage rates are found in Regulations 29 C.F.R. §§ 525.9 and .12; and the procedures for determining prevailing wage rates are found in § 525.10.

### **What conditions are considered "disabilities" for purposes of obtaining a certificate? What conditions are excluded?**

Individuals are considered workers with a disability when their earning or productive capability is impaired by a physical or mental incapacity for the work to be performed, including aged or injured workers. Disabilities which may affect earning or productive capacity include blindness, mental illness, developmental disabilities, cerebral palsy, alcoholism, and drug addiction. They also may include disabilities due to physical injuries to the head, spine, skeletal system, amputations or other losses of muscle, bone, etc., which may cause an individual to be incapable of meeting full productivity.

The following, taken by themselves, are not considered disabilities for the purpose of paying special minimum wages under section 14(c): vocational, social, cultural or educational disadvantages; chronic unemployment; receipt of welfare benefits; nonattendance at school; juvenile delinquency; and correctional parole or probation. These conditions, however, may occur in conjunction with some other mental, physical, or psychological condition.

**Are there any more scheduled increases in the federal minimum wage?**

No. As of May 31, 2009, Congress has not enacted any legislation that would increase the federal minimum wage above \$7.25 per hour.

**Additional Information**

For more information regarding section 14(c) or any other provision of the Fair Labor Standards Act, visit the Wage and Hour Division web site at [www.wagehour.dol.gov](http://www.wagehour.dol.gov) or call our toll-free help line, available 8 a.m. to 5 p.m. in your time zone at 1-866-4US-WAGE (1-866-487-9243). The FLSA statute appears at 29 U.S.C. § 201 *et seq.*

Please note that some state constitutions or minimum wage statutes may not permit the payment of special minimum wages that are less than the state minimum wage to workers with disabilities. The issuance of a certificate by the Wage and Hour Division under the provisions of FLSA section 14(c) for payment of special minimum wages does **not** excuse noncompliance with any such state law establishing higher minimum wage standards. The Wage and Hour Division recommends that employers contact their appropriate state authorities for guidance on this matter.

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