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Special Minimum Wages for Workers with Disabilities: Frequently Asked Questions

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Summary

The Fair Labor Standards Act (FLSA), as amended, sets the minimum wage for covered workers at \$7.25 per hour. Section 14(c) of the FLSA permits certified employers to pay a worker with a disability that impairs the worker's productive capacity a special minimum wage (SMW). The SMW may be below the federal minimum wage but must be commensurate with the worker's productivity and the job's prevailing wage.

This short report answers common questions related to SMWs. It covers

- federal legislation that authorizes SMWs;
- how individuals qualify for SMWs;
- how employers are certified to pay SMWs and how wage levels are set; and
- data on the use of SMWs.

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What federal law regulates minimum wages?

The Fair Labor Standards Act (FLSA) establishes the minimum wage that must be paid to all covered workers.¹ Under current law, the federal minimum wage is \$7.25 per hour.²

What are the provisions that permit the payment of Special Minimum Wages to Workers with Disabilities?

Section 14(c) of the FLSA permits the Secretary of Labor to issue certificates to employers that allow the employer to pay a worker “whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury” wages that are less than the federal minimum wage.³ The FLSA specifies that the intent of this policy is “to prevent curtailment of opportunities for employment” for workers with disabilities.

The FLSA and Department of Labor (DOL) guidance typically refer to a wage provided under Section 14(c) of the FLSA as a “special minimum wage” (SMW).

What conditions qualify a worker for a SMW?

Workers with physical or mental disabilities, including disabilities related to age or injury, may be paid SMWs. However, the fact that a worker has a disability does not, by itself, qualify the worker to be paid a special minimum wage. The worker’s “productive capacity” in the job must be measurably lower than the productive capacity of an experienced worker without a disability in a comparable job.

How are wage levels determined?

A qualified worker’s wage must be set commensurate with the worker’s productivity and the prevailing wage for an experienced worker without a disability on a comparable job (not necessarily minimum wage) in the same geographic area. For example, if the prevailing wage for a job is \$10.00 per hour and the worker with a disability is determined to be 50% as productive as a worker without a disability in a comparable job, the hourly wage of the worker with a disability would be \$5.00.⁴ Notably, this process means that a worker with a disability whose production is the same as a worker without a disability must be paid the prevailing wage for the job.

¹ The FLSA was enacted as P.L. 75-718. It is in the U.S. Code at 29 C.F.R. 201-219. For more information on the FLSA and minimum wage see CRS Report R42713, *The Fair Labor Standards Act (FLSA): An Overview* and CRS Report R43089, *The Federal Minimum Wage: In Brief*.

² Individual states may have a minimum wage that is higher than the federal minimum wage. In these states, employers must pay workers the higher state minimum wage.

³ Policies may vary for workers employed under certain federal contracts.

⁴ For more information on prevailing wage rates and setting wages under Section 14(c), see 29 C.F.R. 525.9-10.

Under current law, there is no wage floor for SMWs. Statute and regulations require employers that are certified to pay SMWs to review workers' productivity and the prevailing wage for the job at least every six months.⁵

How does an employer become certified to pay SMWs?

Not all employers may pay SMWs. To be eligible to pay workers with disabilities SMWs, an employer must apply and be certified by DOL. The employer's application must describe the work that will be performed under the certificate and the prevailing wage surveys conducted by the employer.

Depending on the type of employer, certificates may be valid for one or two years. Renewal applications must provide information on workers currently paid SMW and information on productivity evaluations.⁶

How many employers are certified to pay SMWs?

As of November 1, 2013, there were 1,971 employers with issued certificates and 1,344 employers with pending certificates. In some cases, a single employer may have an issued certificate as well as a pending renewal.

What are the characteristics of employers who are certified to pay SMWs?

Table 1 presents data on the types of employers with SMW certificates issued or pending. About 83% of issued certificates are held by Community Rehabilitation programs. These programs may provide employment for groups of workers eligible for SMWs and are often referred to as "sheltered workshops."

Table 1. Employers with Special Minimum Wage Certificates

As of November 1, 2013, Includes Both Issued and Pending Certificates

Type	Certificates
Community Rehabilitation Programs	2,744
School Work Experience Programs	270
Business Establishments	164
Hospitals or Institutions with Patient Workers	137
Total Certificates	3,315

Source: Certificate Holders section of <http://www.dol.gov/whd/specialemployment/>.

⁵ Workers who are not paid an hourly wage must be reviewed and have their wages adjusted at least once every year. See 29 C.F.R. 529.9(b).

⁶ For more information, see Wage and Hour Division Fact Sheet #39A, "How to Obtain a Certificate Authorizing the Payment of Special Minimum Wages to Workers with Disabilities under Section 14(c) of the Fair Labor Standards Act (FLSA)," <http://www.dol.gov/whd/regs/compliance/whdfs39a.htm>.

The glossary of the Wage and Hour Division Field Operations Handbook defines the type of certificate holders as follows:⁷

- *Community Rehabilitation Program*: Not-for-profit agencies that provide rehabilitation and employment opportunities for people with disabilities. Some may be affiliated with national organizations such as Goodwill Industries or The Arc, while others are private not-for-profit organizations located solely within their local communities.
- *School Work Experience Program*: A program in which a school system may place students with disabilities in jobs in the community at SMWs. Child labor restrictions still apply. The school applies for the certificate, which names the location at which the student(s) will be placed. Separate certificates are required for each business at which students are placed. The original certificate is maintained at the school and the school provides a copy to the business.
- *Hospital or Institution*: A public or private, not-for-profit or for-profit, facility primarily engaged in providing residential care for the sick, the aged, or the mentally ill or retarded, including but not limited to nursing homes, intermediate care facilities, rest homes, convalescent homes, homes for the elderly and infirm, halfway houses, residential centers for drug addicts or alcoholics, and the like, whether licensed or not licensed. “Primarily” means that more than 50% of the facility’s income is attributable to this residential care. These facilities may apply for Section 14(c) certificates to pay SMWs to “patient workers” (defined in next bullet).
- *Patient Worker*: A worker with a disability who is employed by a hospital or institution that provides residential care where such worker receives treatment or care. It does not matter whether such worker is a resident of the establishment or receiving care on an outpatient basis.

Business enterprises are not defined in the handbook, but can generally be described as private, for-profit entities.

How are the SMW provisions of the FLSA enforced?

The Wage and Hour Division (WHD) of DOL is responsible for administering and enforcing the FLSA, including the SMW provisions of Section 14(c) of the FLSA. The WHD primarily enforces the law through investigations. If WHD investigators find a violation of the FLSA, the investigators recommend changes to bring the employer into compliance and oversee the payment of any back wage liability that may have been incurred.

WHD reviews of employers with SMW certificates include verifying that workers are eligible for SMWs (i.e., they have a disability that impairs their productive capabilities), reviewing that employers properly establish prevailing wages, and confirming that productivity reviews are conducted properly and in a timely manner as required by law. According to WHD, many of the most common violations relate to the proper establishment or updating of the prevailing wage.⁸

⁷ See <http://www.dol.gov/whd/FOH/ch64/64k00.htm>.

⁸ WHD lists the most common violations at <http://www.dol.gov/elaws/esa/flsa/14c/20b.htm>.

An individual employee may also petition to have his or her SMW reviewed. A petition is submitted to DOL and reviewed by an administrative law judge. DOL does not advocate on behalf of the employer or employee in these reviews.⁹

How many workers are employed under SMW certificates?

Certificate holders are not required to report the number of workers who are paid SMWs under the certificate. As such, an estimate of the number of workers employed under these certificates is not available.

In 2001, the Government Accountability Office (GAO; then the General Accounting Office) conducted a survey of SMW certificate holders and reviewed DOL documents related to the SMW. GAO estimated that, at the time of their review, 424,000 workers were employed under SMW certificates. About 95% of these workers were employed at what GAO defined as “work centers” (comparable to the Community Rehabilitation Centers discussed previously).¹⁰

What is the average wage for workers employed under a SMW certificate?

Employers are not required to report the wage rates or productivity levels of workers employed under SMW certificates. The aforementioned GAO report estimated that 54% of workers earned less than \$2.50 per hour and 23% earned less than \$1.00 per hour. The report also estimated that 18% of workers employed under SMW certificates earned at least \$5.15 per hour, which was the federal minimum wage at the time.¹¹

What services are employers required to provide to workers who are employed at SMWs?

Other than requiring employers to regularly re-establish prevailing wages and verify worker productivity levels every six months, the FLSA does not require employers to provide any ongoing services to workers who are employed under SMW certificates.

The GAO report, however, found that 99% of work centers provided (or helped workers obtain) supportive services to help workers perform their jobs. For example, 97% of work centers offered assistance with transportation to work, 94% offered assistance with daily living skills, and 98% offered assistance with Job Coaching.¹²

A 2004 survey of a random sample of Community Rehabilitation Programs that held SMW certificates offers additional information on the scope of services available to workers employed

⁹ Full review process is described in regulations at 29 C.F.R. 525.22.

¹⁰ U.S. General Accounting Office, *Special Minimum Wage Program*, GAO-01-886, September 2001, table 6, <http://www.gao.gov/new.items/d01886.pdf>. The estimates in this report are still frequently cited, suggesting that more recent national estimates are not available.

¹¹ Ibid. Table 7.

¹² Ibid. Table 3.

under SMW certificates.¹³ The survey focused on the transition of workers from facility-based services (such as workers in sheltered workshops but also including individuals in non-work activities) into competitive employment or supported employment.¹⁴ The survey found that 70% of providers offered services related to competitive employment and 74% offered services related to supported employment.¹⁵ Approximately 86% of providers reported that each program participant was asked about his or her interest in integrated community employment during annual planning.¹⁶

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¹³ Survey was conducted in 2004 and article cited was published in 2009. See Inge, Katherine et al. “Survey results from a national survey of community rehabilitation providers holding special wage certificates.” *Journal of Vocational Rehabilitation*, 2009. Full record online at <http://www.cerse.vcu.edu/rehab/pubInfo.cfm?id=367>.

¹⁴ The survey defined *competitive employment* as employment in the community, earning at least minimum wage, with limited support from the organization and *supported employment* as employment in the community, earning at least minimum wage, with ongoing support from the organization.

¹⁵ Ibid. Table 2.

¹⁶ Ibid. Table 7.

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