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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;
- data on employers that pay SMWs; and
- services that must be provided in conjunction with the payment 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.<sup>1</sup> Under current law, the federal minimum wage is \$7.25 per hour.<sup>2</sup>

## **What are the provisions of the FLSA 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 certified employers 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.<sup>3</sup> 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.

In the case of a worker age 24 or under, the worker must receive certain services prior to beginning work at an SMW. These services are designed to provide the worker with access to the competitive labor market before the worker accepts employment under a SMW certificate. These services and processes are described in more detail in the “What services must a youth with a disability receive prior to beginning work under an SMW certificate?” question later in this report.

## **How are wage levels determined?**

The wage of a worker employed under an SMW certificate must be commensurate with the worker’s productivity and the prevailing wage for a worker without a disability in a comparable job in the same geographic area. The prevailing wage is not necessarily the minimum wage, but rather the “wage rate that is paid to an experienced worker not disabled for the work to be performed.”<sup>4</sup>

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<sup>1</sup> 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*

<sup>2</sup> 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. For more information on state minimum wages, see CRS Report R43792, *State Minimum Wages: An Overview*, by (name redacted) .

<sup>3</sup> Policies may vary for workers employed under certain federal contracts.

<sup>4</sup> See 29 C.F.R. 525.10.

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.<sup>5</sup> 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.

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.<sup>6</sup>

## **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.<sup>7</sup>

## **How many employers are certified to pay SMWs? What are the characteristics of employers who are certified to pay SMWs?**

As of July 1, 2016, there were 2,464 employers with issued SMW certificates.<sup>8</sup> **Table 1** presents data on the types of employers with SMW certificates issued. About 87% 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 Issued Special Minimum Wage Certificates**

As of July 1, 2016

| Type   | Certificates |
|--|--------------|
| Community Rehabilitation Programs              | 2,142        |
| School Work Experience Programs                | 153          |
| Business Establishments                        | 73           |
| Hospitals or Institutions with Patient Workers | 96           |
| <b>Total Certificates</b>                      | <b>2,464</b> |

**Source:** U.S. Department of Labor, Wage and Hour Division, Certificate Holders section of <https://www.dol.gov/Whd/specialemloyment/index.htm>.

<sup>5</sup> For more information on prevailing wage rates and setting wages under Section 14(c), see 29 C.F.R. 525.9-10.

<sup>6</sup> 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).

<sup>7</sup> 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>.

<sup>8</sup> An additional 124 employers were listed in the database as having pending certificates.

The glossary of the Wage and Hour Division *Field Operations Handbook* defines the type of certificate holders as follows:<sup>9</sup>

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

## **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. As such, there is no regularly published source of wage levels.

## **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.

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<sup>9</sup> See Section 64k00 of the Wage and Hour Division *Field Operations Handbook* at <http://www.dol.gov/whd/FOH/ch64/64k00.htm>.

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.<sup>10</sup>

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.<sup>11</sup>

## **What services must a youth with a disability receive prior to beginning work under an SMW certificate?**

The Workforce Innovation and Opportunity Act of 2014 (WIOA; P.L. 113-128) establishes a set of actions that a worker age 24 or under (“youth with a disability”) must complete prior to beginning work under an SMW certificate.<sup>12</sup> Generally, the new requirements relate to a youth with a disability actively pursuing employment in the community earning a prevailing wage (“competitive integrated employment”). Once a worker has demonstrated and documented unsuccessful pursuit of competitive integrated employment, the worker may accept employment under an SMW certificate. The pre-employment requirements established by WIOA do not apply to workers over the age of 24 or workers who were employed under a SMW certificate prior to the law’s effective date of July 22, 2016.<sup>13</sup>

Under the new provisions, a worker age 24 or under must complete *each* of the following actions prior to beginning work under an SMW certificate:

1. The worker is required to receive pre-employment transition services under Section 113 of the Rehabilitation Act or transition services under the Individuals with Disabilities Education Act.
2. The worker is required to apply for vocational rehabilitation services at the applicable state agency<sup>14</sup> and the worker has either
  - been found ineligible for services from the state agency; or
  - been found to be eligible for services, developed an individualized plan for employment, pursued services for a reasonable period of time, and closed his or her case.
3. The worker is required to receive information and referrals to other resources that offer employment-related services designed to enable the worker to attain competitive integrated employment, earning at least minimum wage.

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<sup>10</sup> WHD lists the most common violations at <http://www.dol.gov/elaws/esa/flsa/14c/20b.htm>.

<sup>11</sup> Full review process is described in regulations at 29 C.F.R. 525.22.

<sup>12</sup> These provisions are in Section 511 of the Rehabilitation Act (29 U.S.C. 794g).

<sup>13</sup> WIOA requires less-intensive informational services for these workers. The services are described in the next question.

<sup>14</sup> Vocational rehabilitation is employment-related services for individuals with disabilities. For more information on federal support of state vocational rehabilitation agencies, see CRS Report R43855, *Rehabilitation Act: Vocational Rehabilitation State Grants*, by (name redacted) .

These provisions took effect in July 2016. As is the case with other components of employment under SMWs, the WIOA provisions relating to SMWs are enforced by the Wage and Hour Division at DOL.<sup>15</sup>

### **What ongoing services must all workers employed under an SMW certificate receive?**

WIOA specifies that workers employed under an SMW certificate must receive informational services and referrals to other resources that offer employment-related services with the objective of competitive integrated employment.<sup>16</sup> Workers may choose to continue to work under an SMW certificate after receiving the required informational services.

These informational services apply to all workers employed under a SMW certificate, regardless of the worker's age or work history. The services must be provided every six months during the first year of employment under a SMW certificate and annually thereafter.

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<sup>15</sup> See Wage and Hour Fact Sheet #39H at <https://www.dol.gov/whd/regs/compliance/whdfs39h.pdf>.

<sup>16</sup> See Section 511(c) of the Rehabilitation Act (29 U.S.C. 794g(c)).



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