

Overview and Discussion of Federal Regulations on Section 511 and Limitations on Use of Subminimum Wage

U.S. Department of Education

Office of Special Education and Rehabilitative Services Rehabilitation Services Administration

U.S. Department of Labor Wage and Hour Division

Overview of Section 511 — Key Definitions

- An “entity” is an employer, or a contractor or subcontractor of that employer, that holds a special wage certificate described in section 14(c) of the Fair Labor Standards Act of 1938 (FLSA).
- “Special wage certificate” means a certificate issued to an employer under section 14(c) of the FLSA that authorizes payment of subminimum wages (i.e., wages less than the statutory minimum wage) under certain conditions.
- “Federal minimum wage” means the rate applicable under section 6(A)(1) of the FLSA.

The section 511 restrictions apply to all entities holding a certificate under section 14(c) that employ or are interested in employing individuals with disabilities. These entities include:

- Work centers (also known as community rehabilitation programs (CRPs));
- Hospital/residential care centers (facilities that employ patient workers);
- Business establishments that are not a work center or an employer of patient workers; and
- School Work Experience Programs (SWEP).

Therefore, all such entities must comply with section 511 of the Act, which provides for no exceptions.

Overview of Section 511 — Purpose

Section 511—

- Prohibits an “entity” that holds a section 14(c) certificate from compensating an individual with a disability at a subminimum wage unless certain conditions are met; and
- Focuses on the payment of subminimum wage, not the nature of the work setting.

Section 511 does not—

- Change the purpose of the Rehabilitation Act;
- Promote subminimum wage employment;
- Eliminate sheltered workshops; or
- Eliminate section 14(c) of the FLSA or the ability to pay subminimum wages under that provision.

Overview of Section 511’s Provisions

Section 511—

- Requires youth with disabilities to satisfy certain service-related requirements prior to starting work at subminimum wage;
- Requires individuals of any age to satisfy certain service-related requirements in order to continue work at subminimum wage;
- Requires VR agencies and local educational agencies (LEAs) to document the individual with a disability’s completion of the requisite services;
- Requires section 14(c) certificate holders to review and verify required documentation received by individuals with disabilities prior to paying or continuing to pay them subminimum wages;

- Requires section 14(c) certificate holders to inform subminimum wage employees of certain training opportunities available to them at required intervals; and
- Permits VR agencies and/or the Department of Labor to review the documentation required to be maintained by section 14(c) certificate holders.

Section 511 Requirements – Youth

Prior to beginning work at subminimum wage, a youth with a disability must demonstrate, through documentation, completion of the following (see section 511(a)(2) of the Act and §§397.20 and 397.30):

- Receipt, as applicable, of—
 - Pre-employment transition services under the VR program; or
 - Transition services under IDEA;
- Application for VR services that results in determination of—
 - Ineligibility; or
 - Eligibility; and
- Receipt of career counseling, and information and referral services.

If the youth is determined eligible for the VR program, he or she must have:

- An approved individualized plan for employment (IPE);
- Been working toward the employment outcome in the IPE for a reasonable period of time and with appropriate supports without success; and
- A closed VR service record.

Regardless of whether a youth with a disability is determined ineligible or eligible for VR services, he or she must receive career counseling, and information and

referral services prior to obtaining employment at subminimum wage with an entity holding a section 14(c) certificate.

A determination of “reasonable period of time,” with respect to the youth’s inability to achieve an employment outcome, must be consistent with:

- Disability-related and vocational needs of the youth;
- Anticipated length of time to complete services in the IPE; and
- For supported employment goals, up to 24 months, or longer if the youth and counselor agree that an extension is needed to meet the goal.

Section 511 Requirements for DSUs – Individuals of Any Age

In order for an individual with a disability, regardless of age, to continue subminimum wage employment with an entity holding a section 14(c) certificate, he or she must be provided, by the DSU, certain services once every six months in the first year of employment and annually thereafter, including:

- Career counseling; and
- Information and referral services.

The DSU may provide these services directly or may contract with another provider of such services in the community that does not hold a section 14(c) certificate.

The DSU must provide documentation of completion of these services to the individual.

Small Business Exception—

- Upon receipt of a referral from a section 14(c) certificate holder that employs fewer than 15 employees, the DSU must inform the individual within 30 calendar days of that referral, of self-advocacy, self-determination, and peer mentoring opportunities available in the

individual's geographic area, provided by an entity that does not have any financial interest in the employment of the individual at subminimum wage.

Required intervals for the provision of career counseling and information and referral services and, as applicable, other services provided by the DSU are as follows:

- For individuals with disabilities hired at subminimum wage on or after July 22, 2016, required services must be carried out every 6 months for the first year and annually thereafter for as long as the individual is employed at subminimum wage.
- For individuals employed at subminimum wage prior to July 22, 2016, the services must be carried out once before July 22, 2017, and annually thereafter.

To ensure the required intervals for the provision of required services are met, it will be important that, to the extent possible, the employer provide the identity and, for newly-hired employees, the date of employment of each individual with a disability employed at a subminimum wage to the DSU.

Career Counseling and Information and Referral Services

Career counseling and information and referral services must:

- Be provided by the DSU in a manner to facilitate independent decision-making and informed choice;
- Not be for subminimum wage employment by an entity holding a 14(c) certificate;
- Not be employment-related services compensated at a subminimum wage or that directly result in employment compensated at a subminimum wage provided by a section 14(c) entity; and

- Be provided within 30 calendar days of a determination for a youth known by the DSU to be seeking employment at subminimum wage.

Career counseling and information and referral services:

- Should be provided by professionals that have a broad understanding of the labor market and career development, knowledge about individuals with disabilities and their employment-related needs and challenges, and specific knowledge about resources and programs that can help to support individuals with disabilities in exploring career choices and finding suitable placements; and
- May include benefits counseling, particularly with regard to the interplay between earned income and income-based financial, medical, and other benefits.

Career counselling and information and referral services may be offered in various settings, including in groups and individually; may combine video or digital communication; and where permitted, may be provided at the worksite or at a mutually convenient location.

DSUs and section 14(c) certificate holders are encouraged to coordinate efforts to meet the requirements in section 511.

Section 511 Requirements for Section 14(c) Entities – Individuals of Any Age

Section 14(c) certificate holders must inform all individuals with disabilities employed at subminimum wage, regardless of age, of self-advocacy, self-determination, and peer mentoring training opportunities available in the individual's geographic area, provided by an entity that does not have any financial interest in the individual's employment outcome.

Required intervals for section 14(c) certificate holders to inform individuals employed at subminimum wages of self-advocacy, self-determination, and peer mentoring training opportunities are as follows:

- For individuals with disabilities hired at subminimum wage on or after July 22, 2016, the required information must be provided every 6 months for the first year and annually thereafter for as long as the individual is employed at subminimum wage.
- For individuals employed at subminimum wage prior to July 22, 2016, the required information must be provided once before July 22, 2017, and annually thereafter.

Documentation Process Related to Youth with Disabilities

- The DSU, in consultation with the State educational agency (SEA), must develop or use an existing process that ensures that youth with disabilities seeking subminimum wage employment receive documentation demonstrating completion of the required activities (section 511(d) of the Act and § 397.10).
- Documentation must contain, at a minimum:
 - Youth's name;
 - Determination made or activity/service completed;
 - Name of individual making the determination or providing the service/activity;
 - Applicable signatures and dates; and
 - Method via which documentation was transmitted to the youth.

The documentation process must ensure—

- The DSU provides documentation to the youth of all activities completed, regardless of whether they were completed under the VR program or IDEA.

- The LEA provides documentation to the DSU, within a reasonable period of time, of all transition services completed by the youth under IDEA.
- Any documentation provided by the LEA to the DSU must comply with confidentiality requirements of the Family Educational Rights and Privacy Act (FERPA).
- The DSU and LEA must retain copies of the documentation in a manner consistent with the requirements of 2 CFR 200.333.

If a youth with a disability or, as applicable, the youth's parent or guardian, refuses, through informed choice, to participate in the activities required by section 511 of the Rehabilitation Act and its implementing regulations in part 397, documentation must, at a minimum:

- Contain the information in §397.10(a)(2); and
- Be provided by the DSU to the youth within 10 calendar days of the youth's refusal to participate.

The DSU should also advise the youth or the youth's parent or guardian that refusal to participate will also result in the youth not being eligible for employment at a subminimum wage with a section 14(c) certificate holder.

Documentation Requirements Related to Individuals of Any Age

- The DSU must provide the individual with documentation of career counseling and information and referral services, and as applicable, information about self-determination, self-advocacy, and peer mentoring training opportunities, once the services have been provided. (§397.40)
- The documentation must:
 - Be provided as soon as possible;
 - Contain, at a minimum, the information in §397.40(d)(2); and

- Be retained, as a copy, by the DSU in accordance with 2 CFR 200.333.

Requirements for section 14(c) certificate holders—

- For individuals, including youth employed as of July 22, 2016, employers will be required to verify that the requirements of section 511(c) have been met within the required time frames prior to paying a subminimum wage.

Contracting Prohibition for Educational Agencies

- Section 511(b)(2) of the Act and §397.31 prohibit the LEA and SEA from entering into a contract, or other arrangement, with an “entity” that holds a certificate under section 14(c) of the FLSA for the purpose of operating a program for a youth under which work is compensated at a subminimum wage.
- Neither section 511 of the Act nor part 397 of the implementing regulations prohibits a SEA or LEA from contracting with an entity that holds a certificate under section 14(c) of the FLSA if the youth are paid at or above the minimum wage or if the purpose is for something other than the work at subminimum wage, such as conducting assessments or providing pre-employment transition services or other transition services.

Review of Documentation

- Section 511 requires entities holding 14(c) certificates to submit to documentation reviews by the DSU, or its contractor, or the Department of Labor. The purpose of these documentation reviews is to ensure that the employers are maintaining proper documentation as required by section 511.

- If the DSU (or contractor) finds any deficiencies while conducting a documentation review, the DSU should report the deficiency to the U.S. Department of Labor's Wage and Hour Division.

Department of Labor Wage and Hour Division (WHD) Enforcement

- The Secretary of Labor possesses authority to enforce the terms under which individuals are employed at a subminimum wage under the FLSA and the authority to enforce the minimum wage and overtime requirements under sections 6, 7, and 11 of the FLSA.
- Section 511 states that its provisions will be construed in a manner consistent with the FLSA.
- Section 511 prohibits section 14(c) employers from paying subminimum wages to individuals with disabilities until all requirements of section 511 have been met for each of those employees.
- Accordingly, if a section 14(c) certificate holder fails to comply with the section 511 requirements, the WHD may assess back pay at the full minimum wage for each affected employee in accordance with the FLSA.

How Can DSUs and Section 14(c) Certificate Holders Work Together to Ensure that the Requirements of Section 511 Are Met?

Coordination between DSUs and section 14(c) certificate holders is essential for ensuring the requirements of section 511 are satisfied. Coordination will help DSUs in identifying individuals with disabilities and providing them with the services required by section 511 in a timely manner, i.e., within the time frames established by the statute. Coordination between the DSUs and other State

agencies or service providers also could be beneficial in ensuring the requirements of section 511 are satisfied.

Coordination will ensure individuals with disabilities currently working on section 14(c) certificates may continue to be employed by the section 14(c) certificate holder at an appropriately determined subminimum wage.

Coordination

Coordination can occur in many ways—

- Section 14(c) certificate holders, LEAs, other agencies and public or private providers, may inform DSUs of the names and contact information of individuals with disabilities seeking employment or currently employed at subminimum wages, consistent with applicable Federal and State laws and regulations protecting an individual's privacy;
- Section 14(c) certificate holders, LEAs, other State agencies, and other public and private providers serving individuals with disabilities, may inform those individuals about how to contact the appropriate DSU directly for the necessary services;
- Section 14(c) certificate holders may permit DSUs to conduct individualized or group career counseling and provide information and referral services during an agreed-upon time at the employer's worksite;
- DSUs may provide individualized counseling sessions (in connection with or instead of any group sessions) to offer more personalized information and may provide the necessary documentation to the individual immediately; and
- DSUs may provide posters or other literature with critical information for individuals with disabilities to employers and offices of other public or private agencies or programs serving individuals with disabilities.

- DSUs may, but are not required to, provide section 14(c) certificate holders with information and contacts, upon request, regarding self-advocacy, self-determination, and peer mentoring training opportunities, or sources to contact for such information in order to assist section 14(c) entities in meeting their obligations.

Some critical points to keep in mind in order for coordination under section 511 to be effective:

- Coordination should be planned and orderly to avoid unnecessary chaos or strain on resources and individuals receiving required services.
- Coordination should take into account that career counseling and information and referral services can be provided to individual workers with disabilities at different times, as long as the services are provided within the required time frame (e.g., every six months during the first year of employment or once a year, depending on when the individual began employment at a subminimum wage).

Further Guidance

- The Department of Education has issued its Final Rule with preamble and implementing regulations at 34 CFR part 397 (81 FR 55629 (Aug. 19, 2016)).
- The Department of Labor has issued Field Assistance Bulletin No. 2016-2 and released Fact Sheet #39H regarding implementation of WIOA and Wage and Hour Division enforcement of section 511's WIOA limitations on payment of subminimum wages under section 14(c) of the FLSA. WHD guidance regarding enforcement of section 511's requirements can be found on their Workers with Disabilities website at: <https://www.dol.gov/whd/workerswithdisabilities/>.

Questions

Please refer questions to your RSA State Liaison

Thank You!