

U.S. Department of Labor Wage and Hour Division

This information is available online at <http://www.dol.gov/whd/FOH/ch64/64c08.htm>

FOH Field Operations Handbook

↳ **Chapter 64** Employment of Workers with Disabilities at Special Minimum Wages under Section 14(c)

↳ **Section 64c** Employment Relationship

Section 64c08: Students with Disabilities and Workers with Disabilities Who are Enrolled in Individual Rehabilitation Programs

- Youths with disabilities often are especially disadvantaged in the workplace because their relative inexperience further complicates their ability to find and maintain meaningful employment. In recognition of the special needs of this population, the U.S. Departments of Labor and Education in 1992 jointly issued guidance regarding the employment relationship under the FLSA and community based education programs for students with disabilities. For these youths, community based employment means placement in a work site outside of his or her school setting, for example, the student may be placed in the mailroom of a corporation headquarters. Included in this guidance is the following *"Statement of Principle"* which summarizes WH's enforcement posture and continued commitment to students with disabilities:
 - ***"The U.S. Departments of Labor and Education are committed to the continued development and implementation of individual education programs, in accordance with the Individuals with Disabilities Education Act (IDEA), that will facilitate the transition of students with disabilities from school to employment within their communities. This transition must take place under conditions that will not jeopardize the protections afforded by the Fair Labor Standards Act to program participants, employees, employers, or programs providing rehabilitation services to individuals with disabilities."***
- In 1993, the U.S. Department of Labor and the National Rehabilitation Facilities Coalition jointly issued similar guidance regarding the FLSA employment relationship and individuals with disabilities (not students in local public school systems) who are enrolled in individualized community-based rehabilitation programs. Enrollment in individualized community-based rehabilitation programs for these individuals means placement in a work site away from the rehabilitation facility. This document also included the following Statement of Principle:
 - ***"The U. S. Department of Labor and community-based rehabilitation organizations are committed to the continued development and implementation of individual vocational rehabilitation programs that will facilitate the transition of persons with disabilities into employment within their communities. This transition must take place under conditions that will not jeopardize the protections afforded by the Fair Labor Standards Act to program participants, employees, employers, or other programs providing rehabilitation services to individuals with disabilities."***
- In an effort to promote vocational training for workers with disabilities, WH will **not** assert an employment relationship between the worker with a disability, the rehabilitation facility or school, and/or the business where the worker has been placed when **all** of the seven following criteria are met (**note:** the criteria are the same for both students and nonstudents enrolled in vocational rehabilitation programs):
 1. Participants are individuals with physical and/or mental disabilities for whom competitive employment at or above the minimum wage level is not immediately obtainable and who, because of their disability, will need intensive ongoing support to perform in a work setting.
 2. Participation is for vocational exploration, assessment or training in a community-based work site under the general supervision of rehabilitation organization personnel, or in the case of a student with a disability, public school personnel.
 3. Community-based placements must be clearly defined components of individual rehabilitation programs developed and designed for the benefit of each individual.

- Each student with a disability shall have an Individualized Education Program (IEP) which lists the needed transition services established for the exploration, assessment, training, or cooperative vocational education components.
 - Each participant in a community-based rehabilitation organization program must have an Individual Plan for Employment (IPE) which includes a statement of needed transition services established for exploration, assessment, or training components. In the past these plans were called Individualized Written Rehabilitation Plans (IWRP).
4. Documentation will be provided to WH upon request that reflects that the individual is enrolled in the community-based placement program, that this enrollment is voluntary and that there is no expectation of remuneration. However, the information contained in the IEP or IPE does not have to be disclosed to WH. The individual with a disability and, when appropriate, the parent or guardian of each individual must be fully informed of the IEP or IPE and of the community-based placement component of the plan.
 5. The activities of the individuals with disabilities (participants) at the community-based placement site do not result in an immediate advantage to the business. Factors that would indicate the business is advantaged by activities of the individual include:
 - Displacement of regular employees.
 - Vacant positions have been filled with participants rather than regular employees.
 - Regular employees have been relieved of assigned duties.
 - Participants are performing services that, although not ordinarily performed by employees, clearly are of benefit to the business.
 - Participants are under continued and direct supervision of employees of the business rather than representatives of the rehabilitation facility or school.
 - Placements are made to accommodate the labor needs of the business rather than according to the requirements of the individual's IEP or IPE.
 - The IEP or IPE does not specifically limit the time spent by the participant at any one site, or in any clearly distinguishable job classification.
 6. While the existence of an employment relationship will not be determined exclusively on the basis of the number of hours spent in each activity, as a general rule, an employment relationship is presumed not to exist when each of the three components does not exceed the following limitations:
 - Vocational explorations - 5 hours per job experienced
 - Vocational assessment - 90 hours per job experienced
 - Vocational training - 120 hours per job experienced
 In the case of students, these limitations apply during any one school year.
 7. Individuals are not entitled to employment at the business at the conclusion of the IEP or IPE. However, if an individual becomes an employee, he or she cannot be considered a trainee at that particular community-based placement unless in a different, clearly distinguishable occupation.
- An employment relationship will exist unless all of the criteria described in FOH 64c08(c) are met. If an employment relationship is found to exist, the employer will be held responsible for full compliance with the FLSA.
 - Business and rehabilitation organizations may, at any time, consider participants to be employees and pay them the full MW required by section 6(a) or the SCA. Properly certified employers may also pay SMWs to participants who are disabled for the work being performed. Employees under age 20 may be paid the Youth Opportunity Wage as provided by section 6(g) of the FLSA rather than an SMW. The Youth Opportunity Wage may never be the prevailing wage upon which a commensurate wage is based.