

Waterman, Robert - WHD

From: Mark Knuckles, SPHR <info@markknuckles.com>
Sent: Saturday, October 03, 2015 4:10 PM
To: WHDPRAComments
Cc: Info@MarkKnuckles.com
Subject: Comments: OMB Control Number 1235-0001, Proposed WH-226 and WH-226A Application to Employ Workers With Disabilities at Special Commensurate Minimum Wages
Attachments: WH-226 Comment Letter to USDOL Control 1235-0001 30Sep15 .pdf

We respectfully submit the attached comments regarding the Information Collections Pertaining to Special Employment Under the Fair Labor Standards Act, OMB Number 1235-0001.

Thank you for the opportunity to comment.

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MARKKNUCKLES Associates, Inc.

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October 3, 2015

Comments: OMB Control Number 1235-0001

**Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210**

Subject: Comment Regarding Proposed WH-226 and WH-226A Application to Employ Workers With Disabilities at Special Commensurate Minimum Wages

Re: Information Collections Pertaining to Special Employment Under the Fair Labor Standards Act, OMB Number 1235-0001.

We respectfully submit the following comments and recommendations regarding the proposed revised WH-226 and WH-226A.

Our Qualifications and Credentials

Our firm is a national provider of consultation and training with 29 CFR Part 525. Our services include pre-submission reviews of the WH-226 and 226A applications and resolutions of compliance issues with submitted applications and lapsed certificates. The firm includes former USDOL WHD investigators, including a former FLSA Section 14(c) specialist whose enforcement experience includes conducting Section 14(c) investigations and reviewing Section 14(c) applications in a Regional Office. MKAI has provided expert FLSA opinions in litigation and non-litigation matters, compliance reviews, and training with the FLSA in general and with 29 CFR Part 525 compliance. With approximately 400 clients in 38 states we specialize with the application of FLSA Section 14(c) and 29 CFR Part 525. We train more CRP staff with 29 CFR Part 525 compliance than all providers other than the USDOL WHD and AbilityOne. Since 1986 we have helped CRPs under investigation by the WHD more than all other consulting and legal firms combined. While with the WHD, following a WH investigation I conducted of a CRP, I successfully obtained litigation from the Atlanta SOL against a workshop. (Wilkes County Sheltered Workshop, N. Wilkesboro, NC).

We understand the needs of competitive industry and how it relates to the commensurate wage requirements and the WIOA. Our clients include manufacturing, wholesale, health care, retail, service, and restaurant chains, state and local government, and state VR agencies. I have earned the Senior Certified Professional certification from the Society for Human Resource Management and the SPHR, Senior Professional in Human Resources certification from the Human Resources Certification Institute. The firm is a pre-approved training provider by HRCI.

WHD investigators have praised our prevailing rate survey methods, time study methods, hourly rating methods and the documentation forms and processes we developed for our clients. Our processes and methods are a compensation strategy that has raised the bench mark of compliance with the industry. Many of these methods and processes have become the standards that the Division now expects for compliance.

Our firm conducts more pre-submission reviews of WH-226 and WH-226A Special Minimum Wage applications than all other providers, working closely, almost daily with the Chicago Regional Office.

Thus, we have a full understanding of the needs and administrative burdens of both the USDOL reviewer and the employers completing the application forms. We are now providing consultation and training with the Workforce Innovation and Opportunity Act, WIOA, and how it impacts commensurate wages and the cultural and paradigm shift that will occur in CRPs.

Comments Regarding Form WH-226

Our comments and suggestions are directed at improving the collection of sufficient relevant data so that the WHD and its reviewers, investigators and others can obtain a more accurate assessment of compliance from the application, while more clearly presenting the information as it relates to the three-part commensurate wage formula.

We are concerned that the WHD has reduced the information requested for workers paid special minimum wages in hourly occupations. Production piece work in CRPs has been declining for a number of years. Hourly occupations/jobs, service type work, is increasing and will expand greatly over the next few years due to the WIOA. The WIOA, with its requirement and emphases on placement in competitive integrated employment, CIE, will force CRPs to expand and improve training in hourly occupations to enable placement in competitive jobs. Workers will be transitioning from piece rate work to exploration and training in hourly service occupations. The application should require ample demonstration of the employer's compliance with the commensurate wage requirements for hourly occupations during this time of transition and expansion. Our comments below for Items 8 and 10 are directed toward that need.

We also urge the WHD to use the correct terminology to be current and consistent with the statute and regulations.

Page 1: Title:

The Title of the form should be "Application for Authority to Employ Workers with Disabilities at Special Minimum Wages."

The term "subminimum wage(s)" is not only incorrect, but misleading. The term "subminimum wage" is not found in the FLSA or in 29 CFR Part 525. A worker with disabilities correctly paid commensurate wages is exempt and not subject to the statutory FLSA Section 6 minimum wage and is thus not paid a "subminimum" wage. The process required by Part 525 for determining the commensurate wage is the process to establish the worker's "special minimum wage." A worker paid a "subminimum wage" is in fact paid unlawfully since their pay would be below their "special minimum wage" as required by Part 525.3. For decades, the previous applications have used the correct term, "special minimum wage(s)" and there is no compelling reason to change it to an incorrect term. The WHD should set the example with using the correct terminology.

The term "subminimum wage" is not consistent with the regulations at Part 525.3(h) and (l):

(h) Special minimum wage is a wage authorized under a certificate issued to an employer under this part that is less than the statutory minimum wage. (Underscoring added.)

(i) Commensurate wage is a special minimum wage paid to a worker with a disability which is based on the worker's individual productivity in proportion to the wage and productivity of experienced nondisabled workers performing essentially the same type, quality, and quantity of work in the vicinity in which the individual under certificate is employed. (Underscoring added.)

We encourage you to replace "subminimum wage" with "special minimum commensurate wages" wherever it is used with the WH-226 and 226A and in the instructions.

Page 1; Items 2, 3, and 4: Employer Status

The employer status should be separately requested for both the employer (assumed work provider) and the parent organization. Many CRPs are now complex or hybrid employers/enterprises where the parent organization is a for-profit or public entity, with another entity that is a not-for-profit. In many situations, the workers with disabilities may work for both the parent and work program with a different status.

This has proven confusing for those employers in attempting to comply and complete the applications. We have found it complicating in investigations and compliance reviews where the investigator or consultant was not aware of a different status with the parent organization who was ultimately responsible for compliance and unpaid wages. If not one FLSA enterprise, the related organizations constitute joint employers.

We believe a separately identified status would enhance oversight by the WHD, the application reviewers, District Offices in scheduling investigations, investigators in preparing for investigations, determining ultimate back wage assessment and liability. Knowing the status of each is critical to enforcement and back wage recovery.

Page 2; Item 6(b) and (c) NUMBER OF WORKERS WITH DISABILITIES

"Workers" must be clarified. As requested, it would include all workers, staff and independent contractor's workers, with disabilities, not just those paid commensurate wages. Thus, employers would have to determine, and/or ask staff and independent contractor workers to self-identify as a worker with disability. The resulting number would not reflect the statistical data needed by the WHD for enforcement.

We urge you to replace the proposed title with "NUMBER OF WORKERS WITH DISABILITIES PAID COMMENSURATE WAGES" and to limit the request in (b) and (c) to "workers paid commensurate wages" to make the request clearer and obtaining only the data that accurately reflects the employer's commensurate wage program.

Page 2; Item 7(b) and (e); GOVERNMENT CONTRACTS

The additional check box "No, but intend to within the next two years" provides no meaningful data for compliance and enforcement. For decades most CRPs hope for or intend to get a government contract. Because of a number of changes in funding, defense size and acquisition and GSA contracting, it is highly improbable that a CRP who does not currently have a contract will get a federal contract. The WIOA implementation and transition will also reduce federal contracts with CRPs. Knowing who "intend(s)" on getting a federal contract does not change their compliance requirements nor the enforcement procedures of the WHD. The answer to

this request will have no impact on the application review, the qualification for a certificate or the status of compliance of the application.

We urge you to eliminate this requirement ("No, but intend to . . ." check box) to keep the focus on those who actually have a federal contract.

Page 2; Item 8; PREVAILING WAGE SURVEY FOR WORKERS PAID HOURLY WAGE RATES
Page 2; Item 10; PREVAILING WAGE SURVEY FOR WORKERS PAID ON A PIECE RATE BASIS:

Requesting prevailing wage survey information separately with hourly jobs and piece rate production jobs will result in duplicate entries and confused applications and misleading data. It will make completion of the form more difficult. It will make compliance reviews by WHD reviewers more difficult. Segregating the prevailing rate information will confuse applicants leading them to believe that there are separate rates for piece rates and hourly rates despite being the same occupation. To obtain the correct prevailing rates, providers must focus on the occupation in industry and not whether it is related to hourly vs piece rated work in their facility. We have found that compliance is achieved and learning is enhanced when it follows the three-part commensurate wage formula, 1) prevailing rate, 2) qualified worker standard, and 3) accurate worker measurement of units or hourly productivity rating.

The proposed Item 8 and 10 will result in CRP staff thinking they must conduct two different prevailing rate surveys, one for hourly rates and one for piece rates, even if the occupations/jobs are the same. Production jobs, contract or not contract, often have both hourly and piece rate workers with the same occupation.

Also, the requirement that it reflect a "contract" further confuses the issue and makes the data less reliable as an indicator of compliance.

The focus must be on "occupation" not contracts. Focusing on the "occupation" instead of "contract" enables an understanding of the relationship of the prevailing wage of an experienced worker without disabilities and that of the worker with disabilities in the jobs or occupations as required in CIE. Occupations typically span programs without contracts with prime manufacturing and services, also contracts within an organization and both hourly and piece rates jobs on the same contract or different contracts.

We urge you to encourage applicants to focus on the occupation in industry and to collect more information to demonstrate compliance. Revise #8 and #10 and make the prevailing rate survey information a stand-alone data report requirement with an attached spread sheet providing space for more than three sources and for the past two years.

In addition to the above points, please also consider the following:

- Asking for the "contract" instead of the "occupation" with the largest number of workers will result in skewed and incorrect data. It will make it difficult for many CRPs to correctly answer because they have hourly workers/jobs without contracts. Many CRPs have large numbers of workers paid special Commensurate wages in different occupations but with no contracts. They would not know how to answer the question. You want to know which occupation has the largest number of workers, not contract.
- Asking and restricting the request for the "contract" incorrectly assumes that a contract has only one occupation or one job. In Item 10, a correctly set up piece work contract would typically have two or more jobs, i.e., assembly, packaging, sealing, etc. Again, requesting the data based

on the occupation will provide more meaningful data that is more relevant to determining the status of compliance.

- The prevailing rate data grid provided does not allow enough space to fully demonstrate compliance. It continues to mislead applicants to thinking only three sources are required. That is not what Part 525 requires.

The regulations at Part 525.20(c) states:

"The appropriate size of such a sample will depend on the number of firms doing similar work but should include no less than three firms unless there are fewer firms doing such work in the area." (Underscoring added. The emphasis is on correlating the size of the survey with the size of the vicinity, not just surveying the lowest three.)

While you provide for an attachment for more information, why not provide a spread sheet requesting the data and format you need to show the applicant's complete survey. This would allow for a more comprehensive and complete report with usable data. Require the applicant to list all the "occupations" that workers with significant disabilities are paid commensurate wages. This would encourage CRPs to obtain more than three sources and would provide reviewers with more accurate picture of the size of the commensurate wage program and their overall compliance efforts. Our experience has shown that organizations that survey more than three sources have the highest level of compliance and pay the highest wages. Those organizations, particularly those in metro areas, who only survey three sources are most often using selective sampling of the lowest wage rate providers.

- The prevailing rate report should request the prevailing rate surveys for the past two years. The certificate covers two years. Asking for both years would allow reviewers, investigators and consultant/trainers to quickly determine whether the annual requirement has been met. The comparison of the two years could also show patterns with compliance. This would be extremely helpful to reviewers checking for compliance with minimum wage adjustments in the states that have annual increases and future federal minimum wage increases.

The prevailing rate surveys are the major compliance issue. Prevailing rates impact the largest group of workers. Thus, we urge the Division to expand this data area and request the surveys for the past two years as a separate item so that it gets the undivided attention of the applicant and the reviewer. The request should include all occupations paid commensurate wages as provided in a furnished spreadsheet form or similar spreadsheet allowing for more than three sources. Accurate wage data is essential to compliance and it should get that attention in the application. The form or substitute should provide for the entry of the seven points of information required in Part 525.

Our recommendation with the two-year survey will not impose a burden on applicants. CRPs that are maintaining compliance already have this information and documentation available in spread sheet format that can be transcribed to your form or attached as a substitute form. In fact, separating the information request as you have proposed will require more effort by the applicant than our recommendation to include two two-year spread sheets reflecting their surveys. It will provide reviewers and investigators the best evidence of compliance. The two-year survey requirement would eliminate and/or answer several compliance issues with reviewing applications for a two-year certificate.

Item 8(b) "Occupation" Not Contract

In Item 8(b), again the WHD needs the information for the largest "occupation" not just a contract. An occupation could span jobs on a number of contracts including SCA contracts. By requiring the information for the largest or the three or four largest "occupations" you can eliminate several of the questions including the questions below the grid concerning SCA government contract work.

The WIOA will shift work from piece rate production to service occupations requiring organizations to greatly improve the training of workers in hourly paid service jobs. The WHD should try to gather more information about "occupations," not contracts, to ensure that workers with disabilities are being properly paid as these programs expand their service job training.

We recommend the following to solicit information the WHD needs to determine compliance and the need for investigation or further inquiry. The first sentence should be;

"How many occupations did the employer have workers with disabilities paid special minimum wages in the last fiscal quarter? _____ Please provide the following information about the four current occupations/jobs with the largest number of workers:

<i>Occupation</i>	<i>Average Number of Workers</i>	<i>Work on SCA Contract</i>	<i>How Often Reviewed</i>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

From the two occupations with the largest number of workers listed above, attach a completed hourly rating for a current worker paid commensurate wages. Include the complete task analysis, documentation of the standard, and the workers' most recent current rating."

(The above would eliminate #8.)

Remove the questions regarding prevailing rate data, about using BLS data and the sources used and place it in the Prevailing rate data area. The check box for "if it was not practical to conduct" should be removed. Every CRP thinks the prevailing rate survey is "not practical." The source of the wage data would be indicated on the prevailing rate spreadsheet.

Items 10 and 11

Again, the focus should be on "occupations," not contracts, and the quality of the time study. Contracts may have several occupations. We urge the WHD to keep 10(a) but make the following revisions to (b) and (c):

Replace 10(b) and (c) with a requirement to furnish data similar to Item 11 in the currently used application but using new terminology to shift to occupations, not contracts:

Provide the time study information about the four occupations/jobs paid piece rates with the largest number of workers. Attach the time study documentation for each.

<i>Occupation/Job</i>	<i>Prevailing Wage</i>	<i>Standard Productivity</i>	<i>Piece Rate</i>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

We recommend that you eliminate the question about SCA work with piece rates. This is extremely rare, if not impractical and unlawful, and thus not useful data in determining compliance from an application.

Again, having another prevailing rate information request just for piece paid work will confuse the applicant, and require additional pages. It will make it more difficult for reviewers requiring them to sort through the different pages. If the applicant has spillover information from either Item 8 or 10 or both, the application will become more complex and more difficult to parse through and determine compliance.

WH-226A

Page 1: Title:

The Title of the form should be "Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Special Minimum Wages."

See our reasoning on page 2 above.

WH-226A Page 2

This report will be an enormous data collection burden for CRPs while not producing data that will indicate compliance. Historically, the WH-226A has been unused and never seen again after submission. While we support making the information more relevant, we urge you to remove data requests that are not needed to indicate compliance, include a request for data mandated by the WIOA.

Column (b); Worker's Date of Hire: This will require searching every client's file, and in many cases several hundred files will need to be pulled or viewed. The hire date has nothing to do with commensurate wage compliance. The DOE will only be relevant in an investigation with workers age 24 or younger.

Column (d); Was worker provided reasonable accommodations(s)? (Yes/No) There is no need for the question because the answer to that question is "yes" for every program, every worker with a disability in a CRP. There is no such "no" answer in a CRP. Reasonable accommodations are not a compliance issue or factor with commensurate wages.

Column (j); Prevailing wage rate for job described in (h): This information is already provided in the prevailing rate spread sheet.

Column (k); Productivity measure/rating for job described in (h): This will be an enormous administrative burden requiring opening the file for every worker paid hourly Commensurate wages. The rating will not be useful and will not indicate compliance, only complicating the submission and review process.

Column (m); Total hours worked for job described in (h): Again this will be an enormous administrative burden. Depending on the how the CRP does their payroll, the level of automation, this may require a manual calculation of week to week time and payroll records while not providing any data useful to determine compliance status.

WIOA Compliance

The form does not ask for information required after July 26, 2016, by the WIOA that the WHD will enforce.

New Column: Was the worker and/or parent/guardian provided annual counseling regarding the benefits of competitive integrated employment? (Yes/No)

New Column: Does the employer have on file for the worker a certificate from the local state unit authorizing commensurate wages? (Yes/No)

In Summary

We applaud the Division's efforts to improve the application process and the forms WH-226 and WH-226A. We encourage you to make the terminology reflect the correct terminology in the regulation, Part 525. The term "subminimum wage" is a misleading term.

We encourage you to require the submission of data that is truly relevant and useful for determining compliance, while keeping it simple, clearly defined and focused on the three parts of the commensurate wage formula, 1) prevailing rates, 2) qualified worker standard, and 3) the measurement of productivity (unit count or hourly rating). This will help the applicant and the reviewer determine compliance.

If you have questions or need clarification of our comments, please contact us via email or phone listed at the bottom of the page.

Respectfully submitted,

Mark Knuckles Associates, Inc.

/S/

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