Chapter DWD 272

MINIMUM WAGES

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Note: Chapter Ind 72 as it existed on July 31, 1978 was repealed and a new chapter Ind 72 was created effective August 1, 1978. Chapter Ind 72 was renumbered Chapter ILHR 272, Register, February, 1996, No. 482, effective March 1, 1996. Chapter ILHR 272 was renumbered chapter DWD 272 under s. 13.93 (2m) (b) 1., Stats., and corrections were made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, May, 1997, No. 497.

DWD 272.001 Declaration of policy. (1) The department, in fulfilling its statutory mandate, has caused extensive studies to be made relative to the consideration of a "living wage" and how the wage should be computed. The concept of "cost of living" and "living wage" is very complex because of the many variables. Any single concept is difficult to apply because of different assumptions, techniques and local conditions.

(2) The rates adopted in this chapter reflect compensation that has been determined to be adequate to permit any employee to maintain herself or himself in minimum comfort, decency, physical and moral well−being. The department has also considered the effect that an increase in the living−wage might have on the economy of the state, including the effect of a living−wage increase on job creation, retention and expansion, on the availability of entry−level jobs and on regional economic conditions within the state.

(6) Room allowances shall be computed on the basis of 20% of the prescribed minimum rate for employees based on a 40 hour week, rounded off to the nearest 5 cents.

(7) Meal allowance shall be computed on the basis of 30% of the prescribed minimum rate for employees based on a 40 hour week, rounded off to the nearest 5 cents.

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78; am (5) (a), Register, March, 1990, No. 411, eff. 4−1−90; r. (2), renum. (3) to be (2), cr. (3), Register, February, 1992, No. 434, eff. 3−1−92; am. (2), Register, February, 1996, No. 482, eff. 3−1−96; corrections made under s. 13.93 (2m) (b) 7., Stats., Register, February, 1996, No. 482; r. (3), (4) and (5), Register, May, 1997, No. 497, eff. 6−1−97.

DWD 272.01 Definitions. As used in this chapter:

(1) "Agriculture" will mean the same as "farm premises" as defined in s. 102.04 (3), Stats., of the worker's compensation act.

(2) "Bona fide school training program" means a program sponsored by an accredited school and authorized and approved by the state department of public instruction or the board of vocational, technical and adult education or other recognized educational body and provides for part−time employment training which may be scheduled for a part of the workday or workweek, supplemented by and integrated with a definitely organized plan of instruction and where proper scholastic credit is given by the school.

(3) A "bona fide vocational training program" is one authorized and approved by the state board of vocational, technical and adult education or other recognized educational body and provides for part−time employment training which may be scheduled for a part of the workday or workweek, for alternating weeks or for other limited periods during the year, supplemented by and integrated with a definitely organized plan of instruction designed to teach technical knowledge and related to industrial information given as a regular part of a student learner's course by an accredited school, college or university.

(4) "Department" means the department of workforce development.

(5) (a) The term "employer" shall mean and include every person, firm or corporation, agent, manager, representative, contractor, subcontractor or principal, or other person having control or direction of any person employed at any labor or responsible directly or indirectly for the wages of another.

(b) The term "employer" shall also include any person, partnership, or corporation engaged in the processing of cucumbers into pickles, who is responsible directly or indirectly for the wages paid for the services of "workers" engaged in the harvesting of cucumbers providing:

1. That the processor or the processor's agent directly or indirectly pays each "worker" performing services in the harvesting of cucumbers or,

2. That the processor or the processor's agent has the right (whether exercised or not) to terminate the services of the "worker" or to transfer a worker's services from one grower to another.

(8) "Industry" means a trade, business, industry, or branch thereof, or group of industries in which individuals are gainfully employed.

(9) A "minor" shall mean any person under 18 years of age.

(9m) "Minor employee" means a minor who is paid at the applicable minor minimum wage rate.

(10) "Month" means 30 days.

(11) "Opportunity employee" means an employee who is not yet 20 years old, during the first 90 consecutive days after the employee is initially employed by the employer.

(12) "Tipped employee" means any employee engaged in an occupation in which they customarily and regularly receive tips or gratuities from patrons or others.

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78; cr. (15), Register, August, 1987, No. 380, eff. 9−1−87; cr. (16), Register, June, 1989, No. 402, eff. 7−1−89; renum. (3) to (16) to be (4) to (9), (12), (15), (13), (17), (3), (16), (14) and (11) and am. (11), cr. (10), Register March, 1990, No. 411, eff. 4−1−90; r. (6) and (7), Register, February, 1992, No. 434, eff. 3−1−92; renum. (12) to (17) to be ILHR 272.09 (1) (g), (h), (j), (k), ILHR 272.01 (12) and ILHR 272.09 (1) (m), Register, February, 1996, No. 482, eff. 3−1−96; am. (4) and r. (11), Register, May, 1997, No. 497, eff. 6−1−97; emerg. cr. (11), eff. 5−31−97; cr. (11), Register, September, 1997, No. 501, eff. 10−1−97; emerg. cr. (9m) eff. 6−1−05; CR 05−056: cr. (9m) Register August 2005 No. 596, eff. 11−1−05.

DWD 272.02 Applicability of orders. The rates prescribed in this chapter shall apply to all employees, including indentured apprentices, employed at private employments including nonprofit organizations, whether paid on a time, piece rate, commission, or other basis.

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78.

DWD 272.025 Statement of intent. Nothing contained in s. DWD 272.03 prohibits an employer from paying more than

the minimum rates listed in this chapter or from treating an employee as a probationary employee for less than the number of days specified in this chapter.

History: Cr. Register, June, 1989, No. 402, eff. 7−1−89; correction made under s. 13.93 (2m) (b) 7., Stats., Register, February, 1996, No. 482.

DWD 272.03 Minimum rates. (1) MINIMUM RATES. This subsection is effective on July 24, 2009. Except as provided in ss. DWD 272.05 to 272.09, no employer may employ any employee in any occupation, trade, or industry at a lesser hourly rate than as follows:

(a) All employees except opportunity and minor employees $7.25 per hour.

(b) Minor employees $7.25 per hour.

(c) Opportunity employees $5.90 per hour.

(1m) MINIMUM RATES. This subsection is in effect from June 1, 2006, to July 23, 2009. Except as provided in ss. DWD 272.05 to 272.09, no employer may employ any employee in any occupation, trade, or industry at a lesser hourly rate than as follows:

(a) All employees except opportunity and minor employees $6.50 per hour.

(b) Opportunity and minor employees $5.90 per hour.

(2) TIPS. Where tips or gratuities are received by the employee from patrons or others, the employer may pay the minimum wage rate established by this subsection, providing the employer can establish by its payroll records that for each week where credit is taken, when adding the tips received to the wages paid, no less than the minimum rate prescribed in sub. (1), was received by the employee. The minimum rate shall be the rate established in par. (a).

(a) *Minimum rates for tipped employees.* All employees except opportunity employees $2.33 per hr.

(am) *Opportunity employees.* Opportunity employees $2.13 per hour.

(b) *Burden of proof.* 1. When the employer elects to take tip credit the employer must have a tip declaration signed by the tipped employee each pay period and show on the payroll records that any required social security or taxes have been withheld each pay period to show that when adding the tips received to the wages paid by the employer, no less than the minimum rate was received by the employee. When the employer's time and payroll records do not contain these requirements, no tip credit shall be allowed.

2. The department may refuse to take action to collect minimum wage deficiencies for a tipped employee who has refused or failed to file an accurate signed tip declaration for the employer each pay period.

(c) *General characteristics of "tips".* 1. Tip means a sum presented by a customer as a gift or gratuity in recognition of some service performed for them. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and generally they have the right to determine who shall be the recipient of their gratuity. In the absence of an agreement to the contrary between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer. Only tips actually received by an employee as money belonging to them which they may use as they choose free of any control by the employer, may be counted in determining whether they are a "tipped employee."

2. In addition to cash sums presented by customers which an employee keeps as their own, tips received by an employee include, amounts paid by bank check or other negotiable instrument payable at par and amounts transferred by the employer to the employee pursuant to directions from credit customers who designate amounts to be added to their bills as tips. Special gifts in forms other than money or its equivalent as above described, such as theater tickets, passes, or merchandise, are not counted as tips received by the employee.

(d) *Tip pooling.* Where employees practice tip splitting, as where waiters or waitresses give a portion of their tips to the bus persons, both the amounts retained by the waiters or waitresses and those given the bus persons are considered tips of the individuals who retain them.

(e) *Service charge.* 1. A compulsory charge for service, such as 15% of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip unless distributed by the employer to their employees.

2. Similarly, where negotiations between a hotel or restaurant and a customer for banquet facilities include amounts for distribution to employees of the hotel or restaurant, the amounts must be so distributed to the employees at the end of the pay period in which it is earned.

3. If the employer in their payroll records can establish a breakdown of the service charge, such as how much is for tips, room charge, decorations, and other chargeable services, only the amount for tips must be paid to the employee at the end of the pay period in which it is earned.

4. Similarly, where an accounting is made to an employer for their information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as their own are counted as their tips.

(f) *Receiving the minimum amount "customarily and regularly".* The employee must receive tips "customarily and regularly" in the occupation in which they are engaged in order to qualify as a tipped employee. If it is known that they always receive more than the stipulated amount each month, as may be the case with many employees in occupations such as those of waiters, waitresses, bellhops, taxicab drivers, barbers, or beauty operators, the employee will qualify and the tip credit provisions of s. DWD 272.03 may be applied. On the other hand, an employee who only occasionally or sporadically receives tips such as at Christmas or New Years when customers may be more generous than usual, will not be deemed a tipped employee. The phrase "customarily and regularly" signifies a frequency which must be greater than occasional, but which may be less than constant. If an employee is in an occupation in which they normally and recurrently receive tips, they will be considered a tipped employee even though occasionally, because of sickness, vacation, seasonal fluctuations or the like, they fail to receive tips in a particular month.

(g) *The tip wage credit.* 1. In determining compliance with the wage payment requirements the amount paid to a tipped employee as allowable under par. (a) by an employer is deemed to be increased on account of tips to equal the minimum wage applicable under sub. (1) to such employee in the pay period for which the wage payment is made. This credit is in addition to any credit for board, lodging, or other facilities which may be allowable under s. DWD 272.03. The credit allowed on account of tips may be less than the difference between the applicable minimum wage and the rate for a tipped employee; it cannot be more.

2. It is presumed that in the application of this special provision the employee will be receiving at least the maximum tip credit in actual tips:"If the employee is receiving less than the amount credited, the employer is required to pay the balance so that the employee receives at least the minimum wage with the defined combination of wages and tips."

3. Under employment agreements requiring tips to be turned over or credited to the employer to be treated by them as part of their gross receipts, it is clear that the employer must pay the employee the full minimum hourly wage, since for all practical purposes the employee is not receiving tip income.

(h) *Overtime payments.* When overtime is worked by a tipped employee who is subject to the overtime pay of ch. DWD 274, their regular rate of pay is determined by dividing their total remuneration for employment in any workweek by the total number of

hours actually worked by them in that workweek for which such compensation was paid. A tipped employee's regular rate of pay includes the amount of tip credit taken by the employer, and the cash wages including commissions and certain bonuses paid by the employer. Any tips received by the employee in excess of the tip credit need not be included in the regular rate. Such tips are not payments made by the employer to the employee as remuneration for employment within the meaning of ch. DWD 274.

(3) ALLOWANCE FOR BOARD AND LODGING. This subsection is effective on July 24, 2009. Where board or lodging or both are furnished by the employer in accordance with s. DWD 272.04, and accepted and received by a particular employee, an allowance may be made not to exceed the following amounts:

(a) *Lodging.* 1. All employees except opportunity and minor employees $58.00 per week or $8.30 per day.

2. Minor employees $58.00 per week or $8.30 per day.

3. Opportunity employees $47.20 per week or $6.75 per day.

(b) *Meals.* 1. All employees except opportunity and minor employees $87.00 per week or $4.15 per meal.

2. Minor employees $87.00 per week or $4.15 per meal.

3. Opportunity employees $70.80 per week or $3.35 per meal.

(3m) ALLOWANCE FOR BOARD AND LODGING. This subsection is in effect from June 1, 2006, to July 23, 2009. Where board or lodging or both are furnished by the employer in accordance with s. DWD 272.04, and accepted and received by a particular employee, an allowance may be made not to exceed the following amounts:

(a) *Lodging.* 1. All employees except opportunity and minor employees $52.00 per week or $7.40 per day.

2. Opportunity and minor employees $47.20 per week or $6.75 per day.

(b) *Meals.* 1. All employees except opportunity and minor employees $78.00 per week or $3.70 per meal.

2. Opportunity and minor employees $70.80 per week or $3.35 per meal.

(4) BOARD AND LODGING, VALUE. Where board, lodging or other necessities of life, are furnished by the employer, in accordance with s. DWD 272.04, and accepted and received by the employee or their spouse or both, minor children or other dependents, an allowance may be made, not to exceed the "fair value" of such necessities on the basis of average cost to the employer, or to groups of employers similarly situated, or average values to groups of employees or other appropriate measures of fair value.

(5) PAYMENT OF WAGES ON OTHER THAN TIME BASIS. Where payment of wages is made upon a basis or system other than time rate, the actual wage paid per payroll period shall not be less than provided for in this order.

(6) HOMEWORK. Wages paid to homeworkers shall be not less than the rates prescribed in this order.

(7) DETERMINATION OF COMPLIANCE. The payroll period shall be taken as the unit of determining compliance with the minimum rates prescribed in this order.

(8) PROOF OF PREVIOUS EMPLOYMENT. An employee is responsible for providing the proof of previous employment necessary to determine whether the person is a probationary employee. An employer shall not be liable for a violation of this section if the violation is caused by the employer's good faith reliance of the proof presented by an employee under this subsection.

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78; am. (1) and (2) (a), Register, August, 1987, No. 380, eff. 9−1−87; am. (1), (2) (a) and (3), Register, June, 1989, No. 402, eff. 7−1−89; am. (1), (2) (intro.) and (3) cr. (8), Register, March, 1990, No. 411, eff. 4−1−90; am. (1), (2) (a) and (3), Register, February, 1992, No. 434, eff. 3−1−92; corrections made under s. 13.93 (2m) (b) 7., Stats., Register, February, 1996, No. 482; r. and recr. (1), (2) (a) and (3), cr. (1m) and (3m), Register, May, 1997, No. 497, eff. 6−1−97; emerg. cr. (1) (b), (1m) (b), (2) (b), am. (3) and (3m), eff. 5−31−97; cr. (1) (b), (1m) (b), (2) (am), am. (3), (3m), Register, September, 1997, No. 501, eff. 10−1−97; emerg. am. (1) and (3), r. (1m) and (3m) eff. 6−1−05; CR 05−056: am. (1), (1m), (3) and (3m) Register August 2005 No. 596, eff. 11−1−05; **CR 08−069: r. and recr. (1) and (3), am. (1m) (intro.) and (3m) (intro.) Register February 2009 No. 638, eff. 3−1−09.**

DWD 272.04 Deductions for meals and lodging. (1) A meal means an adequate well−balanced serving of a variety of wholesome and nutritious foods.

(a) Deductions may be made only for bona fide meals consistent with employee's work shift. No deductions shall be made or credit given for meals not eaten except in employments where weekly room and board is provided and accepted.

(b) An employer shall not require that meals be accepted as part payment of wages.

(c) Employer must pay all employees for "on duty" meal periods. Such periods are to be counted as work time. An "on duty" meal period is one where the employer does not provide at least 30 minutes free from work. Any meal period where the employee is not free to leave the premises of the employer will also be considered an "on duty" meal period.

(d) Authorized rest periods or breaks of less than 30 consecutive minutes per shift shall be counted as work time for which there shall be no deduction from wages.

(e) Whenever a collective bargaining agreement exists, the department may consider the written application of labor and management for a waiver or modification to the requirements of par. (c) or (d), based upon practical difficulties or unnecessary hardship in compliance. If the department determines that compliance with par. (c) or (d) is unjust or unreasonable and that granting a waiver or modification will not be dangerous or prejudicial to the life, health, safety or welfare of the employees, the department may grant a waiver or modification.

(2) Lodging means living accommodations which are adequate, decent and sanitary, according to usual and customary standards. Employees shall not be required to share a bed.

(3) Room and board deductions may not be made from the wages of a seasonal non−resident agricultural employee that would result in the employee receiving less than the prescribed minimum rate.

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78; cr. (1) (e), Register, February, 1992, No. 434, eff. 3−1−92.

DWD 272.05 Agriculture. (1) MINIMUM RATES. The minimum wage of employees employed in agriculture shall be as follows:

(a) Employees 18 years of age and over: . . . $7.25 per hour.

(b) Employees 17 years of age and under: . . $7.25 per hour.

(2) ALLOWANCE FOR BOARD AND LODGING. Where board or lodging or both are furnished by the employer in accordance with s. DWD 272.04, and accepted and received by the employee, an allowance may be made not to exceed the following amounts:

(a)	Lodging—Employees 18 years of age and over:	$58.00 per week or $8.30 per day.
	Employees 17 years of age and under:	$58.00 per week or $8.30 per day
(b)	Meals — Employees 18 years of age and over:	$87.00 per week or $4.15 per meal
	Employees 17 years of age and under:	$87.00 per week or $4.15 per meal

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78; am. (1), Register, August, 1987, No. 380, eff. 9−1−87; am. Register, June, 1989, No. 402, eff. 7−1−89; am. Register, March, 1990, No. 411, eff. 4−1−90; am. (5), Register, February, 1992, No. 434, eff. 3−1−92; correction made under s. 13.93 (2m) (b) 7., Stats., Register, February, 1996, No. 482; emerg. am. (1) (a), (b), (2) (a) and (b) eff. 6−1−05; CR 05−056: am. (1) (a), (b), (2) (a) and (b) Register August 2005 No. 596, eff. 11−1−05**; CR 08−069: am. Register February 2009 No. 638, eff. 3−1−09.**

DWD 272.06 Domestic service employment, casual employment, and companions in private homes. (1) DOMESTIC SERVICE EMPLOYMENT. (a) "Domestic service employment" means all services related to the care of persons or maintenance of a private household or its premises, on a regular basis, by an employee of a private householder. Such occupations

shall include, but not be limited to, the following: butlers, chauffeurs, cooks, day workers, gardeners, graduate nurses, grooms, handy persons, house cleaners, housekeepers, laundry persons, practical nurses, tutors, valets and other similar occupations.

(b) Domestic workers who reside in the employer's household are covered under the rates prescribed by s. DWD 272.03. Employers may take credit for board and lodging as prescribed by s. DWD 272.03 (3). Record keeping requirement provided in s. DWD 272.11 shall apply.

(2) CASUAL EMPLOYMENT. "Casual employment" means employment which is on an irregular or intermittent basis for not more than 15 hours per week for any one employer. This applies to the following: baby−sitting, mowing lawns, raking leaves, shoveling snow or other similar odd jobs. The minimum rates prescribed by s. DWD 272.03 shall not apply to casual employment in or around a home in work usual to the home of the employer, and not in connection with or part of the business, trade or profession of the employer.

(3) COMPANIONS IN PRIVATE HOMES. Persons who reside in the employer's household for the purpose of companionship and who spend less than 15 hours per week on general household work are not covered under the rates prescribed in s. DWD 272.03. As used in this section, the term"companionship services" shall mean those services which provide fellowship, care and protection for a person, who, because of advanced age or physical mental infirmity, cannot care for his or her own needs. Such services may include, but not be limited to, household work related to the care of the aged or infirmed person such as meal preparation, bed making, washing of clothes and other similar services. They may also include the performance of general household work. The term "companionship services" does not include services relating to the care and protection of the aged or infirmed which require and are performed by trained personnel such as registered or practical nurses. While trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78; corrections made under s. 13.93 (2m) (b) 7., Stats., Register, February, 1996, No. 482.

DWD 272.07 Recreational or educational camps. **(1)** MINIMUM RATES. The minimum wage of all employees employed in recreational or educational camps and day camps, except counselors, shall be computed on an hourly basis as prescribed in s. DWD 272.03 (1).

(2) ALLOWANCE FOR BOARD AND LODGING. Where board or lodging or both are furnished by the employer in accordance with s. DWD 272.04, and accepted and received by the employee, an allowance may be made not to exceed the amounts specified in s. DWD 272.03 (3).

(3) COUNSELORS. This subsection is effective on July 24, 2009. The minimum wage of counselors employed in seasonal recreational or educational camps and day camps may be computed on a weekly basis as follows:

(a) Adult counselors 18 years of age and over:

	PER WEEK
1. If board and lodging are not furnished	$350.00
2. If board only is furnished	$265.00
3. If board and lodging are furnished	$210.00

(b) Counselors 17 years of age and under:

	PER WEEK
1. If board and lodging are not furnished	$350.00
2. If board only is furnished	$265.00
3. If board and lodging are furnished	$210.00

(3r) COUNSELORS. This subsection is in effect from June 1, 2007, to July 23, 2009. The minimum wage of counselors employed in seasonal recreational or educational camps and day camps may be computed on a weekly basis as follows:

(a) Adult counselors 18 years of age and over:

	PER WEEK
1. If board and lodging are not furnished	$315.00
2. If board only is furnished	$240.00
3. If board and lodging are furnished	$189.00

(b) Counselors 17 years of age and under:

	PER WEEK
1. If board and lodging are not furnished	$275.00
2. If board only is furnished	$209.00
3. If board and lodging are furnished	$165.00

(4) RECORDS. Recreational or educational camps and day camps are not required to keep the daily and weekly time records required by s. DWD 272.11 (1) (d), (e), and (f), for counselors employed and paid on a weekly basis.

(5) DEFINITIONS. For the purpose of this section:

(a) A "recreational or educational camp" means a camp operated under trained leadership for the purpose of providing group experience for and contributing to the physical, mental, spiritual and social growth of campers who are less than 18 years of age and who make such camp their residence during the camping period.

(b) A "recreational or educational day camp" means a camp operated under trained leadership for the purpose of providing group experience and contributing to the physical, mental, spiritual and social growth of campers who participate in such camping program during daytime periods, but not overnight.

(c) A "camp counselor" means a person employed by a "recreational or educational camp" or "recreational or educational day camp" who leads, directs and instructs campers in such camps in their camping program and activities and shares responsibility for the total care and well−being of campers.

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78; r. and recr. (3) (a) and (b), Register, February, 1980, No. 290, eff. 3−1−80; am. (3) (a) and (b), Register, February, 1992, No. 434, eff. 3−1−92; corrections made under s. 13.93 (2m) (b) 7., Stats., Register, February, 1996, No. 482; am. (title), (1), (4) and (5), Register, May, 1997, No. 497, eff. 6−1−97; emerg. am. (3) eff. 6−1−05; CR 05−056: am. (3), cr. (3g) and (3r) Register August 2005 No. 596, eff. 11−1−05**; CR 08−069: r. and recr. (3), r. (3g), am. (3r) (intro.) Register February 2009 No. 638, eff. 3−1−09.**

DWD 272.08 Caddies. The minimum wage of employees employed as caddies shall be:

$5.90 . . . 9 holes

$10.50 . . . 18 holes

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78; r. and recr. Register, February, 1980, No. 290, eff. 3−1−80; am. Register, February, 1992, No. 434, eff. 3−1−92; emerg. am. eff. 6−1−05; CR 05−056: am. Register August 2005 No. 596, eff. 11−1−05.

DWD 272.085 Student worklike activities and employment. **(1)** INDEPENDENT COLLEGES AND UNIVERSITIES. (a) Independent colleges and universities may employ full−time students who are 18 years of age and over for 20 hours per week or less at the federal minimum wage rates established under 29 USC 206.

(b) Students who work at independent colleges or universities for over 20 hours per week shall be paid at the rates established under s. DWD 272.03.

(2) ELEMENTARY AND SECONDARY SCHOOLS. Student worklike activities that meet the criteria of s. DWD 270.19 are not covered by the minimum wage provisions of this chapter.

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78; correction made under s. 13.93 (2m) (b) 7., Stats., Register, February, 1996, No. 482; r. and recr. Register, October, 2000, No. 538, eff. 11−1−00; **correction in (2) made under s. 13.92 (4) (b) 7., Stats., Register February 2009 No. 638.**

DWD 272.09 Subminimum wage licenses for rehabilitation facilities and for the employment of workers with disabilities and student learners. **(1)** DEFINITIONS. For the purposes of this section:

(a) "Commensurate wage" means a special minimum wage paid to a worker with a disability.

(b) "Employ" means to permit work.

(c) "Employment relationship" means the relationship that exists whenever an individual, including an individual with a disability, is permitted to work.

(d) "Experienced worker" means a worker who has learned the basic elements or requirements of the work to be performed, ordinarily by completion of a probationary or training period.

(dm) "IWRP" means individualized written rehabilitation plan.

(e) "Institution" means an entity which may be either a public or private entity and either a nonprofit or a for profit entity that receives more than 50% of its income from providing residential care for sick, aged, mentally ill or retarded persons. "Institution"includes hospitals, nursing homes, intermediate care facilities, rest homes, convalescent homes, homes for the elderly and infirm, halfway houses, and residential centers for the treatment of drug addiction or alcoholism, whether licensed under s. 50.01, Stats., or not licensed.

(f) "Patient worker" means a worker with a disability employed by a hospital or institution providing residential care where the worker receives treatment or care without regard to whether the worker is a resident of the establishment. In determining whether a patient worker is "employed", the department shall consider whether the work performed is of any consequential economic benefit to the institution. Work is considered to be of consequential economic benefit if it is of the type that workers without disabilities normally perform. A patient does not become an employee if the patient merely performs personal housekeeping chores and receives token remuneration in connection with this activity. It may also be possible for patients in group homes or other family like settings to rotate or share household tasks or chores without becoming employees.

(g) "Sheltered workshop" means a rehabilitation facility which is a charitable organization or institution conducted not for profit, but for the purpose of carrying out a recognized program of rehabilitation for handicapped workers providing such individuals with remunerative employment or other occupational rehabilitating activity of an educational or therapeutic nature.

(h) "Sheltered workshop training program" or ''rehabilitation training program" means a program of not more than 12 months duration designed to:

1. Develop the patterns of behavior which will help a client adjust to a work environment, or

2. Teach the skills and knowledge related to a specific occupational objective of a job family, and which meets the department of workforce development, division of vocational rehabilitation or equivalent standards.

(i) "Special minimum wage" means a wage authorized under a license issued to an employer that is less than the statutory minimum wage.

(j) "Sponsoring agency" means a sheltered workshop, governmental agency or a nonprofit charitable organization or institution carrying out an occupational rehabilitating activity of an educational or therapeutic nature.

(k) "Student learner" means a student who is receiving instruction in an accredited school, college or university and who is employed on a part−time basis, pursuant to a bona fide vocational training program.

(L) "Vicinity" or " locality" means the geographic area from which the labor force of the community is drawn.

(m) "Work activity center" means a rehabilitation facility, a workshop or a physically separated department of a workshop having an identifiable program, separate supervision and records, planned and designed exclusively to provide therapeutic activities for handicapped workers whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

(n) "Worker with a disability" means an individual whose earnings or productive capacity is impaired by a physical or mental disability, including those relating to age or injury, for the work to be performed. Disabilities which may affect earning or productive capacity include blindness, mental illness, mental retardation, cerebral palsy, alcoholism and drug addiction. The following, taken by themselves, are not considered disabilities for the purposes of this section: vocational, social, cultural, or educational disabilities; chronic unemployment; receipt of welfare benefits; nonattendance at school; juvenile delinquency; and correctional parole or probation. Further, a disability which may affect earning or productive capacity for one type of work may not have this effect for another type of work.

(2) WAGE PAYMENTS. (a) An individual whose earning or productive capacity is not impaired for the work being performed cannot be employed under a license and shall be paid at least the applicable minimum wage. An individual whose earning or productive capacity is impaired to the extent that the individual is unable to earn at least the applicable minimum wage may be paid a commensurate wage, but only after the employer has obtained a license authorizing the payment of a special minimum wage from the department.

(b) The employer may not deduct from the commensurate wages of patient workers employed in institutions to cover the cost of room, board or other services provided by the facility. A patient worker shall receive wages with no deductions except for amounts deducted for taxes and any voluntary wage assignments. These rules do not preclude the institution from assessing or collecting charges for room, board and other services actually provided to an individual to the extent permitted by federal or state law and on the same basis as it assesses and collects from nonworking patients.

(c) Under this chapter, an employment relationship arises whenever an individual is permitted to work. The determination as to the existence of an employment relationship does not depend upon the level of performance or whether the work is of some therapeutic benefit. It does not include such activities as making craft products when the individual voluntarily participates in such activities and the products become the property of the individual making them, or all the funds resulting from the sale of the products are divided among the participants in the activity or are used in purchasing additional materials to make craft products.

(3) COMPENSABLE TIME. The employer shall compensate employees for all hours worked. Compensable time includes not only those hours during which the individual is actually performing productive work but also includes those hours when no work is performed but the individual is required by the employer to remain available for the next assignment. If the individual is completely relieved from duty and is not required to remain available for the next assignment, the time will not be considered compensable time. The burden of establishing that any hours are not compensable rests with the facility and the hours must be clearly distinguishable from compensable hours.

Note: As an example, a person employed by a rehabilitation facility would not be engaged in a compensable activity if the person is completely relieved from duty but is provided therapy or the opportunity to participate in an alternative program or activity in the facility that does not involve work and is not directly related to the person's job (examples are self−help skills training, recreation, job seeking skills training, independent living skills, or adult basic education).

(4) SPECIAL PROVISIONS FOR TEMPORARY AUTHORITY. (a) The department may grant temporary authority to an employer to permit the employment of workers with disabilities pursuant to a vocational rehabilitation program of the U.S. department of veterans affairs for veterans with a service−incurred disability or a vocational rehabilitation program administered by a state agency.

(b) Temporary authority under this subsection is effective for 90 days from the date that the designated section of the application

form is completed and signed by the representative of the state agency or the U.S. department of veterans affairs, if the application form is sent to the department within 10 days of the signing. Temporary authority under this subsection may not be renewed or extended by the department.

(c) The signed application form constitutes the temporary authority to employ workers with disabilities at special minimum wage rates. The department shall review all applications under this subsection upon receipt and shall issue a license when the criteria for licensing are met. The department shall promptly notify the applicant if additional information is required or if the license is denied.

(5) CRITERIA FOR EMPLOYMENT UNDER A SPECIAL MINIMUM WAGE RATE LICENSE. (a) To determine whether the approval of special minimum wage rates is necessary in order to prevent the curtailment of opportunities for employment and to determine whether a particular employee will receive a commensurate wage, the department shall consider the following criteria:

1. The nature and extent of the disabilities of the employee as these disabilities relate to the employee's productivity.

2. The prevailing wages of experienced employees not disabled for the job that are employed in the vicinity in industry engaged in work comparable to the work under consideration.

3. The productivity of a worker with a disability compared to the norm established for nondisabled employees through the use of a verifiable work measurement method, or the productivity of experienced nondisabled employees employed in the vicinity on comparable work.

4. The wage rates to be paid to a worker with a disability for work comparable to that performed by experienced nondisabled employees.

(b) Before the license authorizing special minimum wage rates for workers with disabilities is issued, the employer shall provide the following written assurances concerning the employment:

1. In the case of employees paid at hourly rates, the special minimum wage rates shall be reviewed by the employer at periodic intervals with a minimum interval of once every 6 months.

2. Wages for all employees shall be adjusted by the employer at periodic intervals with a minimum interval of once each year to reflect changes in the prevailing wages paid to experienced nondisabled employees employed in the locality for essentially the same type of work.

(6) PREVAILING WAGE RATES. (a) A prevailing wage rate is a wage rate that is paid to an experienced employee not disabled for the work to be performed. There may be more than one prevailing wage rate for a specific type of work in the given area. The department shall require an employer applying for a special minimum wage rate license to demonstrate that the wage rate used as prevailing for determining a commensurate wage was objectively determined according to the requirements of this subsection.

(b) An employer whose work force consists primarily of nondisabled employees or who employs more than a token number of nondisabled employees doing similar work shall use as the prevailing wage the wage rate paid to that employer's experienced nondisabled employees performing similar work. This requirement also applies to the determination of the prevailing wage rate when a sponsoring agency places a disabled employee on the premises of an employer covered by this paragraph.

(c) An employer whose work force primarily consists of employees disabled for the work to be performed may determine the prevailing wage by ascertaining the wage rates paid to the experienced nondisabled employees of other employers in the vicinity. This information may be obtained by conducting a survey of comparable businesses in the area that employ primarily nondisabled employees doing similar work. The businesses that are surveyed should be representative of the area in terms of wages paid to experienced employees doing similar work. The appropriate size of the sample will depend on the number of firms doing similar work but should include no less than 3 businesses unless there are fewer businesses doing similar work in the area. A comparable firm is one which is of similar size in terms of employees or which competes for or bids on contracts of a similar size or nature.

(d) If a survey is not practical, an employer may contact other sources such as the federal bureau of labor statistics or private or state employment services. If similar businesses cannot be found in the area defined by the geographic labor market, the closest comparable community may be used.

(e) The prevailing wage rate shall be based upon the wage rate paid to experienced nondisabled employees. Employment services which only provide entry level wage data are not acceptable as sources for prevailing wage information.

(f) The prevailing wage survey shall be based upon work utilizing similar methods and equipment. The employer shall employ a consistent methodology for tabulating the results of the survey.

(g) The employer shall record the following information in documenting the determination of prevailing wage rates:

1. Date of contact with a firm or other source.

2. Name, address and phone number of firm or other source contact.

3. Title and name of the individual contacted within the firm or source.

4. Wage rate information provided.

5. Brief description of work for which wage information is provided.

6. Basis for the conclusion that the wage rate is not based upon an entry level position.

(h) A prevailing wage may not be less than the minimum wage specified in this chapter.

Note: If the employer is unable to obtain the prevailing wage for a specific job to be performed on the premises (for example, collating documents), it is acceptable to use as the prevailing wage the wage paid to experienced individuals employed in similar jobs requiring the same general skill levels (for example, file clerk or general office clerk).

(7) ISSUANCE OF LICENSES. (a) After considering the criteria given in sub. (5), the department may issue a special license.

(b) If the department issues a special minimum wage license, it shall send a copy to the employer. If the department denies a license, it shall notify the employer in writing and provide the reasons for the denial.

(8) TERMS AND CONDITIONS OF SPECIAL MINIMUM WAGE LICENSES. (a) The department shall specify the terms and conditions under which a special minimum wage license is granted.

(b) The department shall provide that a special minimum wage license applies to each worker employed by the employer receiving the license, provided that the worker is in fact disabled for the work that he or she is to perform.

(c) The department shall designate the period for which a special minimum wage license shall be effective. The employer may pay a wage lower than the minimum wage to a worker with a disability only during the effective period of a license which applies to that worker.

(d) No special minimum wage license shall authorize workers with disabilities to be paid wages that are less than commensurate with those paid to experienced nondisabled workers employed in the vicinity for essentially the same type, quality and quantity of work.

(e) Any special minimum wage license issued by the department shall require that workers with disabilities be paid not less than one and one half times the regular rate of pay for all hours worked in excess of 40 hours per week.

(f) The special minimum wage license shall require that the wage of each worker covered by the license be adjusted by the employer at periodic intervals of at least once per year to reflect changes in the prevailing wages paid to experienced persons who

are not disabled and who are employed in the vicinity for essentially the same type of work.

(g) Each worker with a disability and, when appropriate, a parent or guardian of the worker, shall be informed, verbally and in writing, of the terms of the license under which the worker is employed. This requirement may be satisfied by making copies of the license available. If a worker with a disability displays an understanding of the terms of the license and requests that other parties not be informed, it is not necessary to inform a parent or guardian.

(h) The department shall use the criteria in this paragraph to establish piece rates for workers with disabilities.

1. The employer may establish standard production rates for workers not disabled for the work to be performed by using industrial work measurement methods, including but not limited to stop watch time studies, predetermined time systems, or standard data. The department may require the employer to demonstrate that a particular method is generally accepted by industrial engineers and has been properly executed. The employer may not require specific training or certification. An employer shall not be required to repeat the application of work measurement methods that have already been applied by another employer or source and that can be properly documented.

a. The piece rate paid to a worker with a disability shall be based on the standard production rate. The standard production rate is the number of units that an experienced worker who is not disabled for the work is expected to produce in one hour. The piece rate paid to a worker with a disability shall also be based on the prevailing industry wage rate paid to an experienced nondisabled worker in the vicinity for essentially the same type and quality of work or for work requiring similar skill. The piece rate is determined by dividing the prevailing industry wage rate by the standard number of units per hour.

b. The piece rate for a worker with a disability shall not be less than the actual prevailing piece rate paid to any experienced worker not disabled for the work who is doing the same or similar work in the vicinity.

2. Work measurement methods used to establish piece rates shall meet the following criteria:

a. If a stop watch time study is made, it shall be made with a person whose productivity represents normal performance. If this is not possible, an appropriate adjustment shall be made. An adjustment of this type, which may be referred to as a "performance rating"or "leveling", may be made only by a person knowledgeable in this technique, as evidenced by successful completion of training. The person observed in the stop watch time study shall be given time to practice the work to be performed in order to provide the person with an opportunity to overcome the initial learning curve. In addition, the person observed shall be trained to use the specific work method and tools which are available to the disabled workers for whom rates are to be established.

b. Work measurement methods shall allow appropriate time for personal time, fatigue, and unavoidable delays. In general, this should amount to an allowance of at least 15%, or nine to ten minutes per hour.

c. A work measurement study shall be conducted using the same work method that will be utilized by the workers with disabilities. If a modification such as a jig or a fixture must be made to a production method to accommodate the special needs of an individual worker with a disability, an additional work measurement study need not be conducted as long as the modification enables the disabled worker to perform the work or to increase productivity but would impede the worker without disabilities. If, in a particular case, it is not possible to accommodate a worker with a disability, as for example where an adequate number of machines are not available, a second work measurement study may be required.

(i) The employer shall pay full earnings to each worker with a disability who is employed on a piece rate basis. Employers may "pool" earnings only where piece rates cannot be established for each individual worker.

Note: An example of this situation is a team production operation where each worker's individual contribution to the finished product cannot be determined separately. However, the employer should still make every effort to objectively divide the earnings according to the productivity level of each individual worker.

(j) The requirements of this paragraph apply to the payment of a worker with a disability who is employed at hourly rates.

1. The employer shall base hourly rates upon the prevailing hourly wage rate paid to an experienced worker not disabled for the job who is doing essentially the same type of work and using similar methods or equipment in the vicinity.

2. The employer shall make an initial evaluation of the worker's productivity within the first month after employment begins in order to determine the worker's commensurate wage rate. The employer shall record the results of the evaluation and the employer shall adjust the worker's wages accordingly no later than the first complete pay period following the initial evaluation. The employer shall pay commensurate wages to each worker for all hours worked. If the initial evaluation shows that the wages paid to the worker during pay periods prior to the evaluation were less than the commensurate wage, the employer shall compensate the worker for the difference in pay.

3. Upon the completion of not more than 6 months of employment, the employer shall review the quantity and quality of the work of each hourly wage rate worker with a disability as compared to a nondisabled worker engaged in similar work. The review shall be in writing and shall be recorded. The employer shall conduct and record a similar productivity review at least every 6 months thereafter. The employer shall also conduct and record a productivity review after a worker changes to a new job. After any review, the employer shall adjust the worker's wages appropriately no later than the first complete pay period following the review. Because the purpose of such reviews is to ensure that a worker with a disability receives commensurate wages for all hours worked, conducting reviews at 6−month intervals is a minimum requirement. The employer shall conduct reviews in the manner and frequency necessary to ensure the payment of commensurate wages.

Note: Note: For example, evaluations shall not be conducted before a worker has had an opportunity to become familiar with the job, or at a time when the worker is fatigued or subject to conditions that result in less than normal productivity.

4. Any employer conducting a review covered by this paragraph must include for each review the name of the individual worker, the date and time of the review, and the name and position of the person conducting the review.

(9) RENEWAL OF SPECIAL MINIMUM WAGE LICENSES. (a) An employer with a special minimum wage license may file a written application for renewal with the department.

(b) When an application for renewal of a special minimum wage license has been properly and timely filed with the department, the existing special minimum wage license shall remain in effect until the application for renewal has been granted or denied.

(c) If an application for renewal is denied, the employer may not by the license.

(d) Before any application for renewal is denied, the department shall notify the employer in writing of the facts or conduct which may warrant denial and provide the employer an opportunity to demonstrate or achieve compliance with all legal requirements before a final decision on denial or approval of the application is made.

(10) POSTER. An employer that is operating under a special minimum wage license shall at all times display and make available to employees a poster as prescribed by the department. The poster shall explain, in general terms, the conditions under which special minimum wages may be paid. The employer shall post the poster in a conspicuous place on the employer's premises where

it may be readily observed by workers with disabilities, the parents and guardians of workers, and other employees. As a substitute for posting, the employer may provide a copy of the poster directly to each employee subject to its terms.

(11) RECORDS TO BE KEPT BY EMPLOYERS. Every employer of workers under a special minimum wage license, or the referring agency or facility in the case of records verifying a worker's disabilities, shall maintain and have available for inspection the records specified in this subsection.

(a) Verification of the worker's disability.

(b) Evidence of the productivity of each worker with a disability which has been gathered on a continuing basis or at periodic intervals which do not exceed 6 months in the case of employees paid hourly wage rates.

(c) The prevailing wage paid to a worker who is not disabled for the job performed and who is employed in industry in the vicinity for the same type of work using similar methods and equipment as that used by the worker with a disability employed under the special minimum wage license.

(d) The production standards and supporting documentation for nondisabled workers for each job being performed by a worker with disabilities employed under the special license.

(e) In the case of workers with disabilities who are employed by a recognized non−profit rehabilitation facility and who are working in or about a home, apartment, or room in the residential establishment, the records required under s. DWD 272.11.

(f) The employer shall maintain and preserve the records required by this section for 3 years.

(12) RELATION TO OTHER LAWS. No provision of these rules, or of any special minimum wage license issued under this section, shall excuse noncompliance with any federal law or municipal ordinance which establishes higher standards.

(13) WORK ACTIVITY CENTERS. This section does not prevent an employer from maintaining or establishing a work activity center to provide therapeutic activities for workers with disabilities as long as the employer complies with the requirements of this section.

(14) LICENSING UNDER A SPECIAL LICENSE REQUESTED BY A SPONSORING AGENCY. A sponsoring agency may request a special minimum wage license on behalf of a worker with a disability. The department may issue a license to a worker with a disability which will authorize an employer to pay the rate of pay stated on the license. An employer that hires a licensed worker with a disability shall retain a photocopy of the license for the employer's records. A license issued under this subsection is effective for not more than one year.

Note: The intent of issuing this type of license to a worker with a disability instead of to the employer is to permit the sponsoring agency to make short term placements which enable the worker to gain a variety of experiences without putting the burden on each employer to obtain a license. However, this does not relieve an employer from complying with the Federal Labor Standards Act which requires that an individual subminimum wage license be issued to any federally covered employer.

(15) STUDENT LEARNERS. A license may be issued for a student who is enrolled in a bona fide school training program.

(a) *Application for a student learner license.* 1. Applications shall be filed with the department by the school on behalf of the employer.

2. The application must be made on a form provided by the department, and accompanied by a copy of the training agreement, or, in the absence of such agreement, a copy of the program or curriculum may be submitted. The application must be signed by the employer, the appropriate school official, the student, and the student's parent or guardian.

(b) *Conditions for issuing a license for a student.* 1. Each program must be a bona fide school training program.

2. The employment at subminimum rates is necessary to provide employment opportunities under the program.

3. The student must be at least 14 years of age and obtain a work permit if under 18 years of age.

4. The occupation for which the student is receiving preparatory training must require a sufficient degree of skill to necessitate a learning period.

5. The training must not be for the specific purpose of acquiring manual dexterity and high production speed in repetitive operation. In case of a training program which does not qualify as a bona fide training program within the meaning of s. 104.01 (6), Stats., the employer must pay the trainee the minimum wage for all time spent on the training program whether such time is instructional or work in nature.

6. The employment must not have the effect of displacing a worker employed in the establishment. A student learner must be paid minimum wage for time spent doing work which would be normally done by a regular paid employee if the student learner performed the work.

7. The employment must not tend to impair or depress the wage rates or working standards established for experienced workers for work of a like or comparable character.

8. The issuance of such license must not tend to prevent the development of apprenticeship nor impair established apprenticeship standards in the occupation or industry involved.

(c) *Terms and conditions of license.* 1. The license shall specify, among other things:

a. The name and address of the student.

b. The name and address of the employer.

c. The name and address of the school which provides the related school instructions.

d. The effective and expiration dates of the license.

2. The rate shall not be less than 75% of the applicable rates in s. DWD 272.03.

3. The license shall be effective for the period designated thereon, and no license shall be issued retroactively.

4. A student may work a number of hours in addition to the daily and weekly hours of employment training authorized by the license provided the total hours of work shall not exceed the limits set forth in s. DWD 270.05, and that the pay for such hours is not less than that prescribed in s. DWD 272.03.

5. Students under 18 years of age may not serve at any job prohibited by statute, or orders of the department. (See s. DWD 270.03.)

6. A training agreement shall set down the scheduled duties and responsibilities of the local school, the employer, the student, and the student's parent or guardian. The training agreement shall be signed by an appropriate school official, the employer, the student, and the student's parent or guardian.

7. The department may set a rate of less than 75% of the rates in s. DWD 272.03 for handicapped student learners if justified by extraordinary circumstances. The rates granted shall be commensurate with the student's ability.

(d) *Employment records to be kept.* In addition to the records required in s. DWD 272.11 the employer shall keep the following for each student employed at a subminimum wage rate.

1. The student shall be identified on the payroll records, showing the student's occupation and rate of pay.

2. The employer's copy of the license and training agreement must be available at all times for inspection for a period of 3 years.

(16) DENIAL AND REVOCATION OF LICENSES. (a) The department may deny or revoke a special minimum wage or student learner license for cause at any time. The department may amend or modify a special minimum wage or student learner license if conditions or extraordinary circumstances warrant the action. The grounds for revocation or denial include but are not limited to the facts specified in this subsection.

1. A license may be revoked or denied if misrepresentations or false statements have been made to obtain the license or to permit a worker with a disability to be employed under the license.

2. A license may be revoked or denied if any provision of the Wisconsin labor standards law or any of the terms of the license has been violated.

3. A license may be revoked or denied if the license is no longer necessary in order to prevent a curtailment of opportunities for employment.

(b) Unless the public interest requires otherwise, the department shall notify the employer of facts or conduct which may warrant revocation before beginning revocation proceedings and shall provide the employer an opportunity to demonstrate or achieve compliance with all legal requirements.

Note: The legal procedure for license revocations is established by ch. 227, Stats.

(17) REVIEW. Any person that is aggrieved by an action of the department taken under this section may, within 60 days after learning of the action or within any additional time that the department might allow, file with the department a request for reconsideration or review. The department shall determine if a review shall be granted. If a review is conducted, it shall be conducted by the department. The department may provide other interested persons an opportunity to present data and views.

(18) REHABILITATION FACILITIES. (a) The department 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 protection afforded by the minimum wage law to program participants, employees, employers or other programs providing rehabilitation services to individuals with disabilities.

(b) When all of the following criteria are met, the department shall not assert an employment relationship for the purposes of the minimum wage:

1. Participants are individuals with physical or mental disabilities for whom competitive employment at or above the minimum wage level is not immediately obtainable and who, because of their disabilities, will need intensive ongoing support to perform in a work setting.

2. Participation is for vocational exploration, assessment or training in a community−based placement work site under the general supervision of rehabilitation organization personnel.

3. Community−based placements are clearly defined components of individual rehabilitation programs developed and designed for the benefit of each participant. The statement of needed transition services established for the exploration assessment or training components shall be included in each participant's IWRP.

4. The department does not require disclosure of the information contained in the IWRP. However, the department does require documentation as to the participant's enrollment in the community−based placement program. The participant and, when appropriate, the parent or guardian of the participant, shall be fully informed of the IWRP and the community−based placement component and shall have indicated voluntary participation with the understanding that participation in such a component does not entitle the participant to wages.

5. The activities of the participants at the community−based placement site do not result in an immediate advantage to the business. The department shall be more likely to conclude that there has been no immediate advantage to the business if all of the following determinations can be made:

a. There has been no displacement of employees, vacant positions have not been filled, employees have not been relieved of assigned duties, and the participants are not performing services that, although not ordinarily performed by employees, clearly are of benefit to the business.

b. The participants are under continued and direct supervision by either representatives of the rehabilitation facility or by employees of the business.

c. The placements are made according to the requirements of the participant's IWRP and not to meet the labor needs of the business.

d. The periods of time spent by the participants at any one site or in any clearly distinguishable job classification are specifically limited by the IWRP.

6. Each component of the IWRP may not exceed the following limitations:

a. Vocational explorations: 5 hours per job experienced.

b. Vocational assessment: 90 hours per job experienced.

c. Vocational training: 120 hours per job experienced.

7. A participant is not entitled to employment at the business at the conclusion of his or her IWRP, however, if a participant does becomes an employee, he or she cannot be considered to be a trainee at that particular community−based placement unless he or she is in a clearly distinguishable occupation.

(c) An employment relationship shall exist unless all of the criteria described in par. (b) are met. If an employment relationship is found to exist, the business shall be held responsible for full compliance with the applicable sections of the minimum wage law.

(d) Businesses and rehabilitation organizations may, at any time, consider participants to be employees and may structure a program so that the participants are compensated in accordance with the requirements of the minimum wage law. Whenever an employment relationship is established, the business may make use of the special minimum wage provisions provided by this section.

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78; r. and recr. (2) (a) 1. and am. (2) (a) intro. and 2., Register, August, 1987, No. 380, eff. 9−1−87; r. (1), (2) and (4), renum. (3) to be (15), cr. (1) to (14), (16) and (17), Register, January, 1991, No. 421, eff. 2−1−91; am. (1) (g) (h) (intro.) and (m), Register, May, 1997, No. 497, eff. 6−1−97;**correction in (1) (h) 2. made under s. 13.92 (4) (b) 6., Stats., Register February 2009 No. 638.**

DWD 272.10 Listing deductions from wages. An employer shall state clearly on the employee's paycheck, pay envelope, or paper accompanying the wage payment the number of hours worked, the rate of pay and the amount of and reason for each deduction from the wages due or earned by the employee, except such miscellaneous deductions as may have been authorized by request of individual employees for reasons personal to themselves. A reasonable coding system may be used by the employers.

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78; cr. (1) (dm) and (18), renum. (1) (g) to (i) to be (1) (i), (L) and (n), (1) (g), (h), (j), (k) and (m) renum. from Ind 72.01 (12) to (15) and (17), Register, February, 1996, No. 482, eff. 3−1−96.

DWD 272.11 Permanent records to be kept by the employer. (1) Every employer shall make and keep for at least 3 years payroll or other records for each of their employees which contain:

(a) Name and address.

(b) Date of birth.

(c) Date of entering and leaving employment.

(d) Time of beginning and ending of work each day.

(e) Time of beginning and ending of meal periods:

1. When employee's meal periods are required or when such meal periods are to be deducted from work time.

2. This requirement shall not apply when work is of such a nature that production or business activity ceases on a regularly scheduled basis.

(f) Total number of hours worked per day and per week.

(g) Rate of pay and wages paid each payroll period.

(h) The amount of and reason for each deduction from the wages earned.

(i) Output of employee, if paid on other than time basis.

(2) The required records or a duplicate copy thereof shall be kept safe and accessible at the place of employment or business at which the employee is employed, or at one or more established central record keeping offices in the state of Wisconsin.

(3) The required records shall be made available for inspection and transcription by a duly authorized deputy of the department during the business hours generally observed by the office at which they are kept or in the community generally.

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78.

DWD 272.12 Interpretation of hours worked. (1) PRINCIPLES FOR DETERMINATION OF HOURS WORKED. (a) *General requirements of sections.* 1. Employees subject to the statutes must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer's business." The workweek ordinarily includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place."

2. "Workday," in general, means the period between"the time on any particular workday at which such employee commences their principal activity or activities" and "the time on any particular workday at which they cease such principal activity or activities." The "workday" may thus be longer than the employee's scheduled shift, hours, tour of duty, or time on the production line. Also, its duration may vary from day to day depending upon when the employee commences or ceases their "principal" activities.

(2) APPLICATION OF PRINCIPLES. (a) *Employees "suffered or permitted" to work.* 1. General. Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. They may be a piece-worker, they may desire to finish an assigned task or they may wish to correct errors, past work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that they are continuing to work and the time is working time.

2. Work performed away from the premises or job site. The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, they must count the time as hours worked.

3. Duty of management. In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

(b) *Waiting time.* 1. General. Whether waiting time is time worked depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait, or they may show that he/she waited to be engaged."

2. On duty. A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, a firefighter who plays checkers while waiting for alarms and a factory worker who talks to fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repairperson is working while they wait for their employer's customer to get the premises in readiness. The time is work time even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for their own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait.

3. Off duty. Periods during which an employee is completely relieved from duty and which are long enough to enable them to use the time effectively for their own purposes are not hours worked. They are not completely relieved from duty and cannot use the time effectively for their own purposes unless they are definitely told in advance that they may leave the job and that they will not have to commence work until a definitely specified hour has arrived.

4. On−call time. An employee who is required to remain on call on the employer's premises or so close thereto that they cannot use the time effectively for their own purposes is working while "on call."An employee who is not required to remain on the employer's premises but is merely required to leave word at their home or with company officials where they may be reached is not working while on call.

(c) *Rest and meal periods.* 1. Rest. Rest periods of short duration, running less than 30 minutes are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on−call time.

2. Meal. Bona fide meal periods of 30 minutes or more are not work time. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. The employee is not relieved if they are required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at their desk or a factory worker who is required to be at their machine is working while eating.

(d) *Sleeping time and certain other activities.* Under certain conditions an employee is considered to be working even though some of their time is spent in sleeping or in certain other activities.

1. Definitions. In this paragraph:

a. "Day" means a calendar day or a period of 24 consecutive hours.

b. "Home care premises" means premises or locations, including group homes, in which the employer is acting either directly or indirectly as an agent to provide home care services for an elderly person, a person with a disability, a person otherwise in need of care and assistance in the home, or for the family of such a person.

c. "Homelike environment" means facilities, including private quarters as defined in par. (f), and also including facilities for cooking and eating on the same premises; for bathing in private; and for recreation, such as television. The amenities and quarters shall be suitable for long−term residence by individuals and shall be similar to those found in typical private residence or apartment, rather than those found in institutional facilities such as dormitories, barracks, and short−term facilities for travelers.

d. "Off−duty" means the time period during which the employee is completely relieved from duty and is free to leave the home care premises or otherwise use the time for his or her benefit.

e. "On−duty" means the period of time the employee is required to be on the home care premises or otherwise working for the employer.

f. "Private quarters" means living quarters that are furnished, are separate from the clients and from any other staff members, have as a minimum the same furnishings available to clients, such

as bed, table, chair, lamp, dresser, closet, and in which the employee is able to leave his or her belongings during on−duty and off−duty periods.

g. "Workweek" means 7 consecutive 24−hour periods.

2. Less than 24−hour duty. a. An employee who is required to be on duty for less than 24 hours is working even though they are permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though they are permitted to sleep when not busy answering calls. It makes no difference that they are furnished facilities for sleeping. Their time is given to their employer. They are required to be on duty and the time is work time.

b. Allowances for board and lodging as provided in s. DWD 272.03 (3) or (4) may be considered by a mutual written or implied agreement.

3. a. Where an employee is required to be on duty for 24 consecutive hours or more, the employer and the employee pursuant to a mutual written agreement may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked per 24−hour period, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is more than 8 hours, only 8 hours shall be credited per 24−hour period. Where no written agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. If the sleeping period is interrupted by a call to duty, the interruption shall be counted as hours worked. Employers may take credit for board and lodging as prescribed by s. DWD 272.03 (3) or (4), whichever is applicable. Record keeping requirements provided in s. DWD 272.11 shall apply.

b. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted.

4. Employees residing on employer's premises, home care premises or working at home. An employee who resides on his or her employer's premises or home care premises on a permanent basis or for extended periods of time is not considered as working all the time he or she is on the premises. Ordinarily, the employees may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he or she may leave the premises for purposes of his or her own. It is of course difficult to determine the exact hours worked under these circumstances and any reasonable written agreement of the parties which takes into consideration all of the pertinent facts shall be accepted.

5. Home care premises. a. When an employee who provides home care services does not maintain his or her permanent residence on the home care premises and does not otherwise reside on the premises 7 days a week, the department shall consider an employee who sleeps in private quarters, in a homelike environment, to reside on the premises for an extended period of time within the meaning of par. (d) 4, if the employee resides on the premises for a period of at least 120 hours in a workweek.

b. An employee shall be found to reside on the premises for extended periods of time if both of the following apply: the employee is on duty at the home care premises and is compensated for at least 8 hours in each of 5 consecutive 24−hour periods; and the employee sleeps on the premises for all sleep periods between the beginning and end of the 120 hour period. Any 24−hour period can be utilized, and the 8 compensated hours per 24−hour period need not be consecutive. An employee who is on duty and compensated for the period 5:00 p. m. to 10:00 p.m. Monday, 6:00 a.m. to 9:00 a.m. and 3:00 p.m. to 10:00 p.m. Tuesday through Friday, and 6:00 a.m. to 9:00 a.m. Saturday, and who sleeps on the premises (10:00 p.m. to 6:00 a.m.) for all sleep periods from Monday night through Friday night, has been compensated for at least 8 hours in 5 consecutive 24−hour periods between 5:00 p.m. Monday and 5:00 p.m. Saturday. The employee would also have slept 5 consecutive nights on the premises. Provided the other conditions were met, this would be considered to be residing on the premises for an extended period of time. An employee who is on duty and is compensated from 6:00 a.m. to 9:00 a.m. and 5:00 p.m. to 10:00 p.m., Monday through Friday, and who sleeps Monday through Thursday nights on the premises, would be considered to reside on the premises for extended periods of time. These employees are called "full−time" employees.

c. Where one or more employees meet the "full−time employee residing on the premises test" of subd. 5. b., the department shall apply the provisions of par. (d) 4. to one or more "relief" employees who reside on the premises for 1 to 3 nights, provided these employees are on duty and are compensated for at least 8 hours in each 24−hour period in question and sleep on the premises all intervening nights. Although it is anticipated that there will be no more than one relief employee for each full−time employee, it is possible that there may be more then one. To come within the provisions the relief employee shall be relieving a full−time employee. That is, the full−time employee and the employee or employees relieving that employee may not be on duty for more than a combined total of 7 days and 7 nights in each workweek. A part−time employee shall not be considered a relief employee if that employee and the full−time employee being relieved are on duty simultaneously for more than one hour a day.

d. In order to deduct sleep time for full−time and relief employees, the employees shall be provided private quarters in a homelike environment. A reasonable agreement shall be reached, in advance, regarding compensable time. The employer and the employee may agree to exclude up to 8 hours per night of uninterrupted sleep time. They may also agree to exclude a period of off−duty time during the day when the employee is completely relieved of all responsibilities. These exclusions shall be the result of an employe−employer agreement and not a unilateral decision of the employer. Such an agreement should normally be in writing to preclude any possible misunderstanding of the terms and conditions of the individual's employment.

e. Where sleep time is to be deducted, the employer should determine if the following criteria are met: the employer and the employee have reached agreement in advance that sleep time is being deducted; adequate sleeping facilities with private quarters were furnished; if interruptions occurred, employees got at least 5 hours of sleep during the scheduled sleeping period; employees are compensated for any interruptions in sleep; and no more than 8 hours of sleep time is deducted for each full 24−hour on−duty period.

f. Sleep time may not be deducted for relief or other part−time employees who are not relieving a full−time employee, unless such employees are themselves on duty for 24 hours or more as provided in subd. 3. An off−duty period during a weekday for such employees breaks an on−duty period for the purposes of subd. 3. For example, a duty period from 5:00 p.m. of one day to 5:00 p.m. the following day, during which an employee has uncompensated free time between 9:00 a.m. and 3:00 p.m. of the on−duty period, is not considered to be a 24−hour period.

(e) *Preparatory and concluding activities.* 1. The term "principal activities"includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are the following:

a. In connection with the operation of a lathe, an employee will frequently, at the commencement of their workday, oil, grease, or clean their machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

b. In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to

commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee. Such preparatory activities are compensable under this chapter.

c. Among the activities included as an integral part of the principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform their principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to their principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

(f) *Lectures, meetings and training programs.* 1. General. Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following 4 criteria are met:

a. Attendance is outside of the employee's regular working hours;

b. Attendance is in fact voluntary;

c. The course, lecture, or meeting is not directly related to the employee's job; and

d. The employee does not perform any productive work during such attendance.

2. Involuntary attendance. Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that their present working conditions or the continuance of their employment would be adversely affected by nonattendance.

3. Training directly related to employee's job. The training is directly related to the employee's job it if is designed to make the employee handle their job more effectively as distinguished from training them for another job, or to a new or additional skill. For example, stenographers who are given a course in stenography are engaged in an activity to make them a better stenographer. Time spent in such a course given by the employer or under their auspices is hours worked. However, if the stenographers take a course in bookkeeping, it may not be directly related to their job. Thus, the time they spend voluntarily in taking such a bookkeeping course, outside of regular working hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in their present job, the training is not considered directly related to the employee's job even though the course incidentally improves their skill in doing their regular work.

4. Independent training. Of course, if an employee on their own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for their employer even if the courses are related to their job.

5. Apprenticeship training. As an enforcement policy, time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the following criteria are met:

a. The apprentice is employed under a written apprenticeship agreement or program which substantially meets the fundamental standards of the bureau of apprenticeship standards of the department of workforce development, and

b. Such time does not involve productive work or performance of the apprentice's regular duties. If the above criteria are met the time spent in such related supplemental training shall not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that such time is hours worked.

(g) *Travel time.* 1. General. The principles which apply in determining whether or not time spent in travel is working time depend upon the kind of travel involved.

2. Home to work; ordinary situation. An employee who travels from home before their regular workday and returns to their home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether they work at a fixed location or at different job sites. Normal travel from home to work is not work time.

3. Home to work in emergency situations. There may be instances when travel from home to work is work time. For example, if an employee who has gone home after completing their day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of their employer's customers, all time spent on such travel is working time.

4. Home to work on special one−day assignment in another city. A problem arises when an employee who regularly works at a fixed location in one city is given a special one−day work assignment in another city. Such travel cannot be regarded as ordinary home−to−work travel occasioned merely by the fact of employment if performed for the employer's benefit and at their special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call, or like travel that is all in the day's work. All the time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to their regular work site, the travel between their home and the railroad depot may be deducted, it being in the "home−to−work" category. Also, of course, the usual meal time would be deductible.

5. Travel that is all in the day's work. Time spent by an employee in travel as part of their principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the workplace is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finished their work on the premises at 5 p.m. and is sent to another job which they finish at 8 p.m. and is required to return to their employer's premises arriving at 9 p.m. all of the time is working time. However, if the employee goes home instead of returning to their employer's premises, the travel after 8 p.m. is home−to−work travel and is not hours worked.

6. Travel away from home community. Travel time away from the home community for business purposes that occurs for the benefit of the employer is considered hours worked.

7. When private automobile is used in travel away from home community. If an employee is offered public transportation but requests permission to drive their car instead, the employer may count as hours worked either the time spent driving the car or the time they would have had to count as hours worked during working hours if the employee had used the public conveyance.

8. Work performed while traveling. Any work which an employee is required to perform while traveling must of course be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding,

except during bona fide meal periods or when the employee is permitted to sleep in adequate facilities furnished by the employer.

(h) *Adjusting grievances, medical attention, civic and charitable work, and suggestion systems.* 1. Adjusting grievances. Time spent in adjusting grievances between an employer and employees during the time the employees are required to be on the premises is hours worked, but in the event a bona fide union is involved the counting of such time will, as a matter of enforcement policy, be left to the process of collective bargaining or to the custom or practice under the collective bargaining agreement.

2. Medical attention. Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when they are working, constitutes hours worked.

3. Civic and charitable work. Time spent in work for public or charitable purposes at the employer's request, or under their direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.

4. Suggestions systems. Generally, time spent by employees outside of their regular working hours in developing suggestions under a general suggestion system is not working time, but if employees are permitted to work on suggestion during regular working hours the time spent must be counted as hours worked. Where an employee is assigned to work on the development of a suggestion, the time is considered hours worked.

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78; corrections in (2) (f) 5. a. made under s. 13.93 (2m) (b) 6., Stats., Register, August, 1987, No. 380; cr. (2) (d) 1. and 5., am. (2) (d) 3. a. and 4., Register, February, 1996, No. 482, eff. 3−1−96; emerg. r. and recr. (2) (g) 6. eff 6−1−05; CR 05−056: r. and recr. (2) (g) 6. Register August 2005 No. 596, eff. 11−1−05; **correction in (2) (f) 5. a. made under s. 13.92 (4) (b) 6., Stats., Register February 2009 No. 638.**

DWD 272.13 Forms. The following forms are listed in accordance with s. 227.23, Stats. These forms are issued by and may be obtained from the Equal Rights Division, Department of Workforce Development, P. O. Box 8928, Madison, Wisconsin, 53708.

(1) ERD−9247 Minimum Wage Rates.

(2) LS−37, Application for Subminimum Wage License. This particular form is used for both handicapped workers and student learners. WH−226 is the application for a sheltered workshop to employ handicapped workers at a subminimum wage. WH−227 is a supplement data sheet for sheltered workshop certificate. WH−247 is an application for a certificate for a training or evaluation program in a sheltered workshop. WH−249 is an application for a special individual rate in a sheltered workshop.

History: Cr. Register, July, 1978, No. 271, eff. 8−1−78; corrections in (intro.) made under s. 13.93 (2m) (b) 6., Stats., Register, August, 1987, No. 380; am. (intro.) and (1), Register, May, 1997, No. 497, eff. 6−1−97.

DWD 272.14 Prohibition of displacement. An employer may not displace an employee solely for the purpose of hiring an employee to be paid the opportunity wage.

History: Cr. Register, November, 1997, No. 503, eff. 12−1−97.