

CR 89-206

RULES CERTIFICATE

STATE OF WISCONSIN)
) SS
DEPT. OF INDUSTRY,)
LABOR & HUMAN RELATIONS)

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TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Gerald Whitburn, Secretary of the Department of Industry, Labor and Human Relations, and custodian of the official records of said department, do hereby certify that the annexed rule(s) relating to the issuance of subminimum wage licenses were duly approved and adopted by this department on November 12, 1990.

(Subject)

(Date)

I further certify that said copy has been compared by me with the original on file in this department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the department at 8:30 a.m. in the city of Madison, this 12th day of November A.D. 1990.

Richard Leroy
Secretary

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ORDER OF ADOPTION

Pursuant to authority vested in the Department of Industry, Labor and Human Relations by section(s) 101.02(1), 104.04 and 104.07, Stats., the Department of Industry, Labor and Human Relations creates; amends; repeals and recreates; repeals and adopts rules of Wisconsin Administrative Code chapter (s):

IND 72.09 Subminimum Wage Licenses
(Number) (Title)

The attached rules shall take effect on January 1, 1991, or the last day of the month following publication in the Wisconsin Administrative Register pursuant to section 227.22, Stats.

Adopted at Madison, Wisconsin, this
date: November 12, 1990

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN
RELATIONS

Richard Sarang
Secretary

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RULES in FINAL DRAFT FORM

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Rule: _____ Ind 72.09 _____

Relating to: _____ The Issuance of Subminimum Wage Licenses _____

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SUBMINIMUM WAGE LICENSES
AND
SHELTERED WORKSHOPS

TEXT OF PROPOSED RULES IN FINAL DRAFT FORM

Pursuant to the authority vested in the Department of Industry, Labor and Human Relations under ss. 101.02(1), 104.04 and 104.07, Wis. Stats., the Department of Industry, Labor and Human Relations hereby repeals s. Ind 72.09(1), (2) and (4) and creates Ind 72.09(1) through (14), (15) and (17) and rennumbers Ind 72.09(3) to Ind 72.09(15), Wis. Adm. Code, relating to the issuance of subminimum wage licenses to Wisconsin employers and workers.

ANALYSIS

This proposed rule revises the types of subminimum wage licenses issued by the Wisconsin Department of Industry, Labor and Human Relations. The changes are made to remain consistent with the federal law on the licensing of sheltered workshops, which was changed by the issuance of new federal regulations on August 10, 1989.

Under the existing rule, a sheltered workshop may have separate subminimum wage licenses for different programs within the workshop. Under this proposal, one license would be issued to the workshop or to an authorized individual employer and all workers for that workshop or employer would be covered by the single license. The proposed rule continues provisions requiring an employer to maintain records and to provide periodic reviews of the employe's performance to ensure that each employe is being paid in a manner commensurate with his or her ability.

SECTION 1. Ind 72.09(1), (2) and (4) are repealed.

SECTION 2. Ind 72.09(1) to (14), (16) and (17) are created to read:

Ind 72.09 SUBMINIMUM WAGE LICENSES 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 to 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.

(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 employe 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 employes.

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

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

(i) "Worker with a disability" means an individual whose earning 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 employes 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 ten 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 employe will receive a commensurate wage, the department shall consider the following criteria:

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

2. The prevailing wages of experienced employes 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 employes through the use of a verifiable work measurement method, or the productivity of experienced nondisabled employes 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 employes.

(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 employes 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 six months.

2. Wages for all employes 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 employes 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 employe 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 employes or who employs more than a token number of nondisabled employes doing similar work shall use as the prevailing wage the wage rate paid to that employer's experienced nondisabled employes performing similar work. This requirement also applies to the determination of the prevailing wage rate when a sponsoring agency places a disabled employe 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 three 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 six 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 six 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 six-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: 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 continue to pay the special minimum wage rates previously authorized 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 employes 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 employes. As a substitute for posting, the employer may provide a copy of the poster directly to each employe 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 six months in the case of employes 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. Ind 72.11.

(f) The employer shall maintain and preserve the records required by this section for three 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 Fair Labor Standards Act which requires that an individual subminimum wage license be issued to any federally covered employer.

(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.

SECTION 3. Ind 72.09(3) is renumbered Ind 72.09(15).

SECTION 4. EFFECTIVE DATE. This rule shall take effect on the first day of the month commencing after the date of publication as provided by s. 227.22(2), Stats.

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Tommy G. Thompson
Governor
Gerald Whitburn
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State of Wisconsin Department of Industry, Labor and Human Relations

November 12, 1990

✓ Gary Poulson
Assistant Revisor of Statutes
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Douglas LaFollette
Secretary of State
10th Floor
30 West Mifflin Street
Madison, Wisconsin 53703

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Dear Messrs. Poulson and LaFollette:

TRANSMITTAL OF RULE ADOPTION

CLEARINGHOUSE RULE NO. 89-206

RULE NO. IND 72.09

RELATING TO: The Issuance of Subminimum Wage Licenses

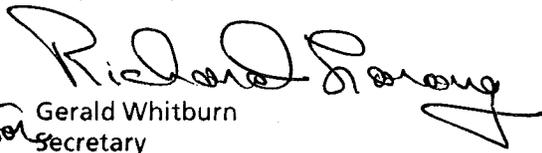
Pursuant to section 227.20, Stats., agencies are required to file a certified copy of every rule adopted by the agency with the offices of the Secretary of State and the Revisor of Statutes.

At this time, the following material is being submitted to you:

1. Order of Adoption.
2. Rules Certificate Form.
3. Rules in Final Draft Form.

Pursuant to section 227.114, Stats., a summary of the final regulatory flexibility analysis is also included.

Respectfully submitted,


Gerald Whitburn
Secretary