



*** FLSA-547 ***

August 6, 1991

This is in response to your letter regarding the use of a person with a disability in conducting a time study or work measurement under Regulations, 29 CFR Part 525. Section 525.12(i) of these regulations states, in part, that:

If stop watch time studies are made, they shall be made with a person or persons whose productivity represents normal or near normal performance. If their productivity does not represent normal or near normal performance, adjustments of performance shall be made.

In your letter, you ask for confirmation of the following three statements:

Q. An agency can use a person with a disability (blindness) in a time study to develop a production standard provided that the person is considered not disabled for the job.

A. There is nothing in the regulations or Departmental policy that would preclude the use of an individual with a disability in a time study or work measurement where the disability does not relate to the particular job being performed. If the person is not disabled for the particular job, his or her productivity should, all other things being equal, represent "normal or near normal performance" and no adjustments would be necessary.

Q. An agency can use a person with a disability in a time study who is rated as 100 percent effective. However, if after the study is conducted they pay the person below the minimum wage on the same operation, this would raise sufficient concern with DOL that the agency would have to explain in significant detail the reason why the person is not earning at least the minimum wage.

A. If an agency determines that an individual with a disability is not disabled for the work to be performed and elects to use that individual to conduct the time study or work measurement and does not adjust the standard, that person should be able to consistently equal that standard when actually performing the operation in question and thus earn at least the minimum wage. It would raise questions as to the accuracy of the time study or work measurement if that person were subsequently unable to reach the standard on a consistent basis. (It would also raise questions with respect to other individuals with the same or similar disabilities.) For example, did the time study or work measurement include all of the irregular elements of the job? Is the method the same? What is it about the individual that has changed since the time study or work measurement was conducted? Similar questions would also be raised with respect to any workers without disabilities employed by the agency who did not earn minimum wage or otherwise perform up to the standard on a regular basis.

Q. An agency can use a person with a disability on a time study who is rated as 100 percent effective. However, if after the study the person is paid below the minimum wage on a different operation requiring skills other than of the type used in the time study, they could pay the worker below minimum without the necessity of an explanation, provided that the person's production warrants such payment and is paid commensurately.

A. This is a more problematic situation and the answer would depend on the particular circumstances in a given situation. If all other requirements are met, including those relating to time studies or work measurements, prevailing wages, evidence of disability, and recordkeeping, and the differences in the skills required are obvious, it is possible that a special explanation might not be necessary. However, such an interpretation would be left to the discretion of the investigator conducting the compliance review. The burden of showing that a subminimum wage rate paid pursuant to the authority granted under the certificate is commensurate with an individual's productivity as required by the statute and regulations rests with the employer.

The Wage and Hour Division neither encourages nor discourages the use of individuals with disabilities in conducting time studies or work measurements so long as the time studies or work measurements otherwise meet the requirements of the Regulations.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator