



December 14, 2020

To: Employers with Federal Sub-Minimum Wage Certificates & Other Interested Stakeholders

Re: **Minimum and Sub-Minimum Wages for Coloradans with Disabilities**

The U.S. Department of Labor (“USDOL”) issues some employers “214(c) certificates” allowing sub-minimum wages for certain workers with disabilities. In late 2019, we learned that some employers may be unaware that *federal* certificates offer no exemption from laws of *states*, like Colorado, mandating higher minimum wages and restricting any state-issued certificates. Over the past year, in studying such wages in Colorado and carefully considering possible courses of action, this Division learned that USDOL publicly lists all employers that received 214(c) certificates. We ultimately decided that list provides us an opportunity to begin with a compliance-assistance rather than enforcement-focused effort: by sending all employers on that list, and other interested stakeholders, this letter on what federal and Colorado law do and do not permit as to minimum wages for Coloradans with disabilities.

Section 214(c) of the federal Fair Labor Standards Act (“FLSA”) lets USDOL grant employers “special certificates” waiving federal minimum wages for those whose “capacity is impaired by age, physical or mental deficiency, or injury.” But FLSA § 218 and USDOL rules caution that “no provision” of the FLSA, of USDOL rules, “or of any special minimum wage certificate . . . , shall excuse noncompliance with . . . *State law or municipal ordinance establishing higher standards*” (29 C.F.R. § 525.20). As a 2016 USDOL Opinion Letter further explained:

[B]ecause the FLSA allows states to establish higher requirements, *section 14(c) does not preempt a state law prohibiting . . . wages less than the state minimum wage to workers with disabilities*. The FLSA establishes a national minimum wage floor, and section 14(c) provides . . . wage rate[s] lower than that floor to certain workers.... *States may raise the minimum wage floor by prohibiting payment of a wage lower than the state's minimum wage to some or all workers with disabilities*. States may do this in several ways, including by express prohibition of . . . wage rates lower than the state minimum wage or by not exempting certain employees.... *The FLSA therefore does not excuse an employer from compliance with more protective standards required under state law*. 29 U.S.C. 218(a); 29 C.F.R. 525.20. *If an employer has been issued a section 14(c) certificate . . . , the employer must nevertheless comply with any applicable state law requiring the payment of a state minimum wage rate that is higher than the . . . wage rate applicable to each worker covered by the section 14(c) certificate.*<sup>1</sup>

Compared to federal law, Colorado law imposes not only higher minimum wages, but also higher sub-minimum wage requirements: “An employer may pay . . . fifteen percent lower than the minimum wage to persons certified by the director [of the Division] to be less efficient due to a physical disability.” C.R.S. § 8-6-108.5(2). Because that quoted law is a statute, it cannot be waived or changed by a rule from any state agency, including this Division. Breaking down those statutory requirements:

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<sup>1</sup> Minimum wage rules still apply to work described as vocational training, including for those with disabilities: “Without doubt the Act covers . . . beginners, learners, or handicapped persons, . . . unless a [214(c)] permit not to pay such minimum has been obtained.” *Wirtz v. Wardlaw*, 339 F.2d 785, 788 (4th Cir. 1964) (minimum wage required for minors doing office work, even if the work helped “teach the two young women enough to . . . determine whether they would be interested in . . . careers” in that field) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947)). Minimum wage may not be required for a *short-term* or *curricular* skills training that qualifies workers for new, *non-training* jobs. *E.g.*, *Walling*, 330 U.S. at 149 (“a course of practical training to prospective yard brakemen . . . [of] seven or eight days”); *Reich v. Parker Fire Protection District*, 992 F.2d 1023, 1025 (10th Cir. 1993) (prospective firefighters training for “ten weeks” at the locality’s “firefighting academy,” with a “curriculum” of “basic fire science and [fire department] standard operating procedures, . . . classroom lectures, . . . demonstrations, physical training, and simulations”). Work under 214(c) certificates, however, typically is neither *curricular* nor a *short-term* program that helps trainees *gain new, non-training jobs*.

- Sub-minimum wages can be only “fifteen percent lower than” Colorado minimum wages. So even if sub-minimum wages were allowed at any employer, **the lowest lawful sub-minimum wage is \$10.20 in 2020 and \$10.47 in 2021**, 15% below those years’ minimum wages of \$12.00 and \$12.32.<sup>2</sup>
- Sub-minimum wages are lawful for **only “physical disability,” not “mental” or “age”-based** conditions as in federal § 214(c) (those “impaired by *age, physical or mental* deficiency, or injury”).
- Certificates must be from the relevant *Colorado* labor official, not *USDOL*, and **there are currently no valid Colorado certificates**. None were issued in at least the past five years, and even if any existed long ago, they could not remain valid, because the analysis required “prior to paying a subminimum wage ... must be reviewed and updated at least once a year,” *USDOL* has explained.

To summarize all of the above requirements of federal and Colorado law as to minimum and sub-minimum wages for Coloradans with disabilities:

- (1) Federal 214(c) sub-minimum wage certificates offer no exemption from Colorado minimum wages. Only a Colorado-issued certificate from the Division of Labor Standards and Statistics could.
- (2) There are no currently valid Colorado-issued certificates for sub-minimum wages. Consequently, Colorado minimum wages have been and remain required for all Coloradans with disabilities.
- (3) Even if any Colorado sub-minimum wage certificates were issued, Colorado statutes allow them:
  - (A) only 15% below the minimum wage — so no wage below \$10.20 in 2020 could be lawful; and
  - (B) only for physical disabilities — so no sub-minimum wage of any amount could be lawful for mental or age-based disabilities or conditions.

While the requirements of these laws are unambiguous, we understand they may not have been well-known to all employers. We hope this letter clarifies how minimum wages apply to Coloradans with disabilities.

While Colorado law mandates that the Division investigate all *complaints filed by employees*, it leaves this Division with discretion in “strategic enforcement” decisions on which alleged *employer- or sector-wide* violations to investigate. As to the latter: this letter does not, and legally could not, grant an exemption or commit not to enforce wage law that Colorado law charges the Division with enforcing. However, the strategic enforcement priorities this Division has set for the current fiscal year, through June 2021, do not include sub-minimum wages based on disability. By then, almost two years after the Division first learned of Coloradans with disabilities receiving sub-minimum wages, the Division will need to begin investigating whether any such wages remain. But we are hopeful that this current compliance-assistance, rather than enforcement-focused, effort can sufficiently assure a level playing field in the Colorado labor market -- not only for Colorado workers with disabilities, but also for Colorado employers who pay full minimum wages, including to workers with disabilities.

As part of our compliance-assistance focus, we welcome questions or requests for further clarification. The contact information atop of this letter will connect you with experienced Division staff able to answer any inquiries.

Sincerely,



Scott Moss

Director

Division of Labor Standards and Statistics

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<sup>2</sup>Jobs receiving enough tips can be paid \$3.02 below the applicable minimum or sub-minimum wage, though.