



CUT AND PASTE POST JANUARY, 2024

Labor Department Cracks Down on Section 511 Subminimum Wage

Section 511 of the Rehabilitation Act allows certified employers to pay subminimum wages to disabled workers under certain circumstances. Specifically, under the [2014 Workforce Innovation and Opportunity Act \(WIOA\)](#), employers may pay individuals with disabilities age 24 or younger a subminimum wage as long as they can show that these employees:

- have received transition services and pursued employment through vocational rehabilitation; and
- have been provided information and referrals to other options in their area; and
- receive career counseling and information (CCIR) about training opportunities once every six months during the first year and annually after that.

When employers fail to comply with the requirements of Section 511, they must pay the workers the full federal minimum wage for all hours worked.

To protect employees, the U. S. Department of Labor’s (DOL) Wage and Hour Division evaluates an employer’s compliance with Section 511 requirements in every investigation it conducts of an employer that holds a subminimum wage certificate.

In June of 2022, the DOL Office of the Solicitor filed suit in the U.S. District Court for the District of Montana, Billings Division, alleging the owner and operator of Special K Ranch – a Columbus, Montana, residential and working ranch facility for individuals with intellectual and developmental disabilities – violated the requirements of Section 511.

The litigation followed a Wage and Hour investigation which found that the Ranch had falsely stated it had complied with WIOA. As a result of these findings, the DOL asserted that the Ranch had to pay the full minimum wage to legally continue to employ the workers until such time as the workers receive the required information and services.

In terms of damages, investigators determined the Ranch paid 35 employees below federal minimum wage during and after the investigation period. In some cases, the workers were paid as little as \$1.17 per hour. The investigation found that Ranch employees were underpaid a total of approximately \$333,000.

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On December 19, 2023, Federal District Judge Susan P. Watters entered an “Injunction and Judgement by Consent” in which the DOL and the Ranch agreed to resolve the case without further litigation. In the consent document, Special K was enjoined to cease their illegal activities, and was ordered to correct past deficiencies in their obligations with current employees and to pay employees at least \$7.25 per hour unless paying a subminimum wage pursuant to a certificate issued by the Department of Labor. The Ranch was also ordered to pay the Secretary of Labor \$166,486 in back wages and \$166,486 in liquidated damages.

Professional Pointer: The 2022 unemployment rate for persons with a disability was 7.6%: about twice that of the rate for those without a disability. Section 511 offers employers a great opportunity to hire employees, and gives individuals with disabilities the skills needed to enter the workforce. The DOL recently issued new guidance, Field Assistance Bulletin No. 2022-4 “[Enforcement of the Rehabilitation Act Section 511 Requirements for Workers with Disabilities in the Section 14\(c\) Program](#),” which supplements Field Assistance Bulletin Numbers [2016-2](#) and [2019-1](#), [Fact Sheet 39H](#) and [other materials designed to provide guidance](#) on the provisions of Section 511 and the protections it offers workers.

Long Term, Part Time Employees and 401(k)’s

The SECURE Act defines long term, part time (LTPT) employees as employees who have 3 consecutive years with more than 500 hours and less than 1,000 hours of service. Beginning on January 1, 2024, LTPT employees who meet the three-consecutive-year requirement and satisfy the plan’s other eligibility conditions are eligible to make deferral contributions to a qualified 401(k) plan. This is a departure from prior eligibility conditions rules that allowed plans to require participants to reach age twenty-one and complete a 1,000-hour year-of-service prior to participation in a 401(k) plan.

Employers have until December 31, 2025 to amend their plans to comply with this change.

A few other things you may need or want to know:

- A plan may impose a vesting schedule for employer contributions made on behalf of LTPT employees, and may require no more than 500 hours of service in a year to be credited with a year of vesting service.
- Employers may still apply an age 21 requirement for the LTPT employee, and these new requirements do not impact the exclusion of collectively bargained employees and non-resident aliens.
- LTPT employees can be excluded from nondiscrimination and coverage testing.
- LTPT employees are included for purposes of “Top Heavy” testing.

Professional Pointer: Most 401(k) plans probably need amended to reflect this change, so check with your plan administrator. On November 27, 2023, the [Internal Revenue Service \(IRS\)](#) released [proposed regulations](#) that provide additional guidance around LTPT employees. The IRS also stated that taxpayers may rely on these proposed regulations until they are finalized.

DOL Requesting Input on Proposed Rulemakings

The U.S. Department of Labor's (DOL) Employment and Training Administration (ETA) is proposing changes to the following rules:

- **Schedule A Work Certification.** On December 22, 2023, the ETA issued a [request for information \(RFI\)](#), seeking feedback on potential modernizations to Schedule A of the permanent labor certification process. Schedule A, which was last updated in 2004, lists occupations for which the “DOL has predetermined there are not sufficient U.S. workers who are able, willing, qualified, and available.” Employers interested in hiring to fill a position listed as a Schedule A occupation are not required to conduct a labor market test and may file an application for permanent employment certification directly with U.S. Citizenship and Immigration Services (USCIS).
Issued pursuant to President Biden's [Executive Order](#) on “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence,” the RFI specifically seeks feedback on whether any science, technology, engineering, and mathematics (STEM) occupations should be added to Schedule A, and which jobs should be considered part of a STEM occupation. **Comments are due by February 20, 2024.**
- **National Apprenticeship System.** On December 14, 2023, the ETA released a [notice of proposed rulemaking \(NPRM\)](#) to amend the regulations governing registered apprenticeship programs. The 779-page NPRM implements the [National Apprenticeship Act of 1937](#), which is a little over one page in length. Among other provisions, the proposal would:
 - “create more safeguards for apprentices to ensure that they have healthy and safe working and learning environments as well as just and equitable opportunities throughout their participation in a registered apprenticeship program”;
 - allow government “Registration Agencies to take over the role of the National Labor Relations Board by empowering them to dissolve apprenticeship programs when any program sponsor or participating employer is merely alleged to have interfered with workers’ Section 7 rights; and
 - aim to make “quality improvements throughout the system to improve the protection, safety, and welfare of apprentices, such as proposed prohibitions on non-compete and non-disclosure provisions in apprenticeship agreements between sponsors and apprentices and enhanced protections against unreasonable participation costs for apprentices.”

Comments are due sixty days after publication in the *Federal Register* (it's not in there as of 1/4/24, so keep an eye open for that!) *A webinar regarding these proposed changes will be held on January 11, 2024 at noon MST.* [Log in to reserve a seat here](#)

PWFA Regulations on the Way?

The Equal Employment Opportunity Commission (EEOC) was supposed to have published implementing regulations to the [Pregnant Workers Fairness Act \(PWFA\)](#) by December 29, 2023. While public comment closed October 10, 2023, as of January 4, 2024, the regulations are not on the EEOC's website.

Professional Pointer: See <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act> and be on the lookout for these regulations in 2024!