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The NYS CASE is sponsored by the New York State Education Department, ACCES-VR
Influencers Impacting FLSA Compliance
Forces and Influencers...

- Increased emphasis of IDEA on transition services and support
- Pre-employment Transition Services in WIOA
- Employment First
- Expansion of work-based learning experiences through Career Development and Occupational Studies (CDOS) credential
“The FLSA establishes minimum wage, overtime pay, recordkeeping, pay equality, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments.”

“The Wage and Hour Division (WHD) of the US DOL administers and enforces the FLSA.”
Federal Statements of Principle

• "The U.S. Departments of Labor and Education are committed to the continued development and implementation of individual education programs, in accordance with the Individuals with Disabilities Education Act (IDEA), that will facilitate the transition of students with disabilities from school to employment within their communities. This transition must take place under conditions that will not jeopardize the protections afforded by the Fair Labor Standards Act to program participants, employees, employers, or programs providing rehabilitation services to individuals with disabilities."
• "The U. S. Department of Labor 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 protections afforded by the Fair Labor Standards Act to program participants, employees, employers, or other programs providing rehabilitation services to individuals with disabilities."
FLSA compliance hinges on...

...whether or not there is an assertion of an employment relationship.
• In order for the FLSA to apply there must be an employer-employee relationship. This requires...
  • an “employer” and “employee” and
  • the act of condition of employment
    • method of compensation not material
Non-Assertion Of Employment Relationship

• WH will not assert that initial participation by a student with disabilities in a school-work program constitutes an employment relationship if certain conditions are met. However, after an employment relationship has developed, the provisions of the Act will be applicable.
The conditions under which an employment relationship initially will not be asserted are:

- The activities are basically educational, are conducted primarily for the benefit of the participants, and comprise one of the facets of the educational opportunities provided to the students. The student may receive some payment for their work in order to have a more realistic work situation, or as an incentive to the student or to insure that the employer will treat the student as a worker.
Condition 2

The conditions under which an employment relationship initially will not be asserted are:

• The time in attendance at the school plus the time in attendance at the experience station (either in the school or with an outside employer) does not substantially exceed the time the student would be required to attend school if following a normal academic schedule. *Time in excess of 1 hour beyond the normal school schedule or attendance at the experience station on days when school is not in session would be considered substantial.*
The conditions under which an employment relationship initially will not be asserted are:

- The student **does not displace a regular employee** or impair the employment opportunities of others by performing work which would otherwise be performed by regular employees who would be employed by the school or an independent contractor including, for example, employees of a contractor operating the food service facilities at the school.
Shift To An Employment Relationship

• As a general guide, work for a particular employer, either a private employer or the school, after 3 months will be assumed by WH to be part of an employment relationship unless the facts indicate that the training situation has not materially changed.

  • Thus, if the conditions which warranted the finding that the student is not considered an employee continue, he or she may remain for a period of time as a trainee rather than an employee.

  • On the other hand, if after the 3-month period the training aspects are subordinated and the work aspects clearly predominate, the student will be considered as an employee.
Trainees, Students and Employment Relationship

• If all six of the following criteria apply, the trainees or students are not employees within the meaning of the FLSA:
  • The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
  • The training is for the benefit of the trainees or students.
  • The trainees or students do not displace regular employees, but work under their close observation.
• The employer that provides the training derives no immediate advantages from the activities of the trainees or students, and on occasion operations may actually be impeded.

• The trainees or students are not necessarily entitled to a job at the conclusion of the training period.

• The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.
Field Operations Handbook

https://www.dol.gov/whd/FOH/ch64/64c08.htm
In an effort to promote vocational training for workers with disabilities, WH will not assert an employment relationship between the worker with a disability, the rehabilitation facility or school, and/or the business where the worker has been placed when all of the seven following criteria are met (note: the criteria are the same for both students and nonstudents enrolled in vocational rehabilitation programs):

FOH 64c08(c)
Participants are individuals with physical and/or mental disabilities for whom competitive employment at or above the minimum wage level is not immediately obtainable and who, because of their disability, will need intensive ongoing support to perform in a work setting.

FOH 64c08(c)
Participation is for vocational exploration, assessment or training in a community-based work site under the general supervision of rehabilitation organization personnel, or in the case of a student with a disability, public school personnel.

FOH 64c08(c)
– Community-based placements must be clearly defined components of individual rehabilitation programs developed and designed for the benefit of each individual.

• Each student with a disability shall have an Individualized Education Program (IEP) which lists the needed transition services established for the exploration, assessment, training, or cooperative vocational education components.

• Each participant in a community-based rehabilitation organization program must have an Individual Plan for Employment (IPE) which includes a statement of needed transition services established for exploration, assessment, or training components.

FOH 64c08(c)
• Documentation will be provided to WH upon request that reflects that the individual is enrolled in the community-based placement program, that this enrollment is voluntary and that there is no expectation of remuneration. However, the information contained in the IEP or IPE does not have to be disclosed to WH. The individual with a disability and, when appropriate, the parent or guardian of each individual must be fully informed of the IEP or IPE and of the community-based placement component of the plan.

FOH 64c08(c)
The activities of the individuals with disabilities (participants) at the community-based placement site do not result in an immediate advantage to the business.

FOH 64c08(c)
Factors that would indicate the business is advantaged by activities of the individual include:

- Displacement of regular employees.
- Vacant positions have been filled with participants rather than regular employees.
- Regular employees have been relieved of assigned duties.
- Participants are performing services that, although not ordinarily performed by employees, clearly are of benefit to the business.
- Participants are under continued and direct supervision of employees of the business rather than representatives of the rehabilitation facility or school.
- Placements are made to accommodate the labor needs of the business rather than according to the requirements of the individual's IEP or IPE.
- The IEP or IPE does not specifically limit the time spent by the participant at any one site, or in any clearly distinguishable job classification.

FOH 64c08(c)
While the existence of an employment relationship will not be determined exclusively on the basis of the number of hours spent in each activity, as a general rule, an employment relationship is presumed not to exist when each of the three components does not exceed the following limitations:

- Vocational explorations - 5 hours per job experienced
- Vocational assessment - 90 hours per job experienced
- Vocational training - 120 hours per job experienced

In the case of students, these limitations apply during any one school year.

FOH 64c08(c)
• Individuals are not entitled to employment at the business at the conclusion of the IEP or IPE. However, if an individual becomes an employee, he or she cannot be considered a trainee at that particular community-based placement unless in a different, clearly distinguishable occupation.

FOH 64c08(c)
In light of FOH-64c08(c), what type of documentation should a supported employment program maintain in file to ensure FLSA compliance and to verify non-assertion of an employment relationship?
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Questions