DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

WAGE AND HOUR DIVISION

GENERAL RULES

(By authority conferred on the director of the department of licensing and regulatory affairs by section 6 of the improved workforce opportunity wage act, 2018 PA 337, MCL 408.936, and Executive Reorganization No. 2016-3, MCL 408.431)

PART 1. GENERAL PROVISIONS

R 408.701 Definitions.

Rule 1. As used in these rules:

(a) "Act" means the improved workforce opportunity wage act, 2018 PA 337, MCL 408.931 to 408.945.

(b) "Administrative capacity" means an employee to whom all of the following apply:

(i) Compensation is on a salary basis at no less than the federal standard salary level per week for overtime exempt employees.

(ii) The employee's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer.

(iii) The employee uses discretion and independent judgment in matters of significance.

(c) "Commission" means all earnings of an employee, in addition to the hourly rate of pay, which the employee has been led to expect on a regular basis as a result of an employment contract, agreement, or promise.

(d) "Compensatory time" means paid time off earned at 1½ times the regular hours worked in excess of 40 hours in a week and paid at some future time.

(e) "Department" means the department of licensing and regulatory affairs.

(f) "Executive capacity" means an employee to whom all of the following provisions apply:

(i) Compensation is on a salary basis at not less than the federal standard salary level per week for overtime exempt employees.

(ii) The employee's primary duty is management.

(iii) The employee supervises 2 or more employees.

(g) "Fee" means a fixed amount for a service provided or job completed regardless of time required for completion.

(h) "Paid time off " means compensation for time off paid to the employee for vacation, personal time, or sick time.

(i) "Professional employee" means an employee who is compensated on a salary or fee basis at no less than the federal standard salary level per week for overtime exempt employees and whose primary duty is any of the following:

(i) Work in a field of science or learning that requires knowledge acquired by a prolonged course of specialized instruction.

(ii) Work in a recognized field of artistic endeavor that depends upon the talent of the employee.

(iii) Work in an educational institution as a teacher, tutor, instructor, or lecturer.

(j) "Salary" means payment of a fixed amount not subject to reduction because of variations in the quantity or quality of work performed.

(k) “Tipped employee” means an employee who receives gratuities and meets the requirements found in section 4d of the act, MCL 408.934d.

(l) "Workweek," as applied to an employee, means a fixed and regular recurring period of 168 hours or 7 consecutive 24-hour periods. Workweek need not coincide with the calendar week, but may begin on any day and at any hour of the day. For purposes of computing overtime pay, a single workweek may be established for 1 employee or different workweeks may be established for different employees or groups of employees.

History: 1954 AC; 1979 AC; 1998-2000; 2016 AACS; 2019 AACS.

R 408.702 Records.

Rule 2. (1) An employer shall keep employment records for each employee showing all of the following:

(a) Name.

(b) Home address.

(c) Date of birth.

(d) Occupation in which employed.

(e) Total daily hours worked, showing the starting and ending times each day, computed to the nearest tenth of an hour, or other finer measure.

(f) Total hours worked in each pay period.

(g) Total hours worked in each work period when the work period does not coincide with the pay period.

(h) Total hourly, daily, or weekly basic wage.

(i) Total wages paid each pay period.

(j) Itemization of all deductions made each pay period.

(k) Itemization of tips received in each pay period.

(2) An employer shall keep records for employees paid on a piecework basis to indicate pieces produced.

(3) If a credit is taken for gratuities received by an employee, then the employment records shall contain for each pay period in which the credit was taken a written statement of the amount of gratuities received by the employee. The statement shall be signed by the employee and dated before the date the paycheck was received.

(4) Records required under this rule shall be preserved by the employer for not less than 3 years.

History: 1979 AC; 1981 AACS; 1998-2000 AACS.

R 408.703 Rescinded.

History: 1979 AC; 1981 AACS; 1998-2000 AACS.

R 408.704 Rescinded.

History: 1979 AC; 1981 AACS; 1998-2000 AACS.

R 408.705 Rescinded.

History: 1979 AC; 1981 AACS; 1998-2000 AACS.

R 408.706 Complaint; filing date; time limitation.

Rule 6. (1) A complaint shall be considered filed with the department as of the date it is received by the department.

(2) A claim must be filed with the department within 3 years of the date of the alleged violation.

(3) As used in this rule, "claim" means a form or other written statement received by the department from an employee, for work performed in Michigan, that provides the name and address of the claimant, name and address of the employer, date or dates the alleged violation occurred, and an estimate of the amount of minimum wages or overtime wages, or both, alleged due.

History: 1981 AACS; 1998-2000 AACS; 2019 AACS.

R 408.711 Scale of piecework for harvesting fruits and vegetables.

Rule 11. The scale of piecework applicable to the harvesting of fruits and vegetables is to be at least equivalent to the minimum hourly wage rate.

History: 1979 AC; 2016 AACS.

R 408.712 Rescinded.

History: 1979 AC; 2016 AACS.

R 408.713 Rescinded.

History: 1954 ACS 55, Eff. Aug. 14, 1968; 1954 ACS 65, Eff. Sept. 21,1970; 1954 ACS 83, Eff. Apr. 2, 1975; 1954 ACS 95, Eff. June 13, 1978;1954 ACS 99, Eff. Apr. 18, 1979; 1979 AC; 2016 AACS.

PART 2. OVERTIME COMPENSATION

R 408.721 Determining workweek for overtime compensation.

Rule 21. (1) An employer shall establish an employee's workweek and shall indicate the beginning time and day of the workweek in the employment record for the employee.

(2) Once the beginning time of an employee's workweek is established, it remains fixed and may be changed only if the change is intended to be permanent and is not designed to evade the overtime requirements of the act.

(3) Each workweek stands alone. Averaging of hours over 2 or more weeks is prohibited, regardless of whether the employee works on a standard or swing shift schedule and regardless of whether the employee is paid on an hourly, daily, weekly, biweekly, monthly, piecework, commission or other basis, except as otherwise provided by law.

History: 1979 ACS 8, Eff. Dec. 2, 1981; 2000 AACS.

R 408.722 Work period.

Rule 22. (1) An employer shall establish an employee's work period and shall indicate the beginning and ending time and date of the work period in the employment record for the employee.

(2) The work period need not coincide with the pay period.

(3) The beginning and ending date of a work period shall not be changed, regardless of the number of hours worked within the period, unless the change is intended to be permanent and is not designed to evade the overtime requirements of the act.

(4) An employer may have different work periods for different employees.

History: 1979 ACS 8, Eff. Dec. 2, 1981; 2000 AACS.

R 408.723 Computing regular rate of pay for overtime compensation.

Rule 23. (1) If an employee is paid on an hourly rate plus commission or salary plus commission, then the salary and commission shall be considered as gross earnings for the workweek, and the regular rate is obtained by dividing the sum by the number of hours for which the salary was paid.

(2) If an employee is paid on a piece-rate basis, then the regular rate of pay is computed by adding together the total earnings of the workweek from piece rates and all other earnings and any sums paid for other hours worked. This sum total is divided by the number of hours worked in that week to yield the pieceworker's regular rate for that week.

History: 1981 AACS; 1998-2000 AACS.

R 408.724 Rescinded.

History: 1981 AACS; 1998-2000 AACS.

R 408.725 Rescinded.

History: 1981 AACS; 1998-2000 AACS.

R 408.726 Rescinded.

History: 1981 AACS; 1998-2000 AACS.

R 408.727 Rescinded.

History: 1981 AACS; 1998-2000 AACS.

R 408.728 Amusement and recreational establishments exempt from overtime provisions.

Rule 28. (1) An employer's business shall be considered an amusement or recreational establishment if it complies with all of the following provisions:

(a) It is open for the general public at a fixed site.

(b) It is open primarily to provide leisure activities for those who attend.

(c) It does not operate for more than 7 months in a calendar year.

(2) A grocery store, restaurant, motel, curio, souvenir shop, or any other retail and service establishment is not considered an amusement or recreational establishment unless it is so related to an amusement or recreational establishment that it could not, in a reasonable manner, offer its services to the general public independently, and is not open to the general public beyond the months the amusement or recreational establishment to which it is related is open.

(3) The exempt status of an amusement or recreational establishment and a grocery store, restaurant, motel, curio, souvenir shop, or other retail and service establishment operated under the same ownership shall be determined separately for each establishment.

(4) If an amusement or recreational establishment operates at widely separated fixed locations, the exempt status of each fixed location shall be determined separately.

History: 1981 AACS; 1998-2000 AACS.

R 408.729 Employees of an amusement or recreational establishment.

Rule 29. (1) Employees of a central office or warehouse or office which services an amusement or recreational establishment shall not be considered employed by the amusement or recreational establishment.

(2) An employee whose duties are divided between working for an amusement or recreational establishment and a nonexempt business owned by the same employer shall not be exempt from the overtime provisions of the act for any workweek in which work performed at the nonexempt business exceeds 20% of the hours worked.

History: 1981 AACS; 1998-2000 AACS.

R 408.730 Employment in agriculture.

Rule 30. (1) An employee shall not be considered employed in agriculture for any workweek in which nonagricultural work exceeds 20% of the hours worked in the workweek.

(2) An employee of an establishment which produces agricultural commodities and sells such commodities to the general public shall not be considered employed in agriculture, regardless of his or her duties, if more than 50% of the gross income of the establishment results from sales to the general public.

History: 1981 AACS; 1998-2000 AACS.

R 408.731 Rescinded.

History: 1979 AC; 1981 AACS.

R 408.732 Rescinded

History: 1979 AC; 1981 AACS.

R 408.733 Rescinded.

History: 1981 AACS; 1998-2000 AACS.

R 408.734 Rescinded.

History: 1981 AACS; 1998-2000 AACS.

R 408.735 Rescinded.

History: 1981 AACS; 1998-2000 AACS.

WAGE DEVIATION

R 408.771 Scope.

Rule 1. (1) These rules require that handicapped workers who are being paid sub-minimum wages shall receive wage rates commensurate with their productive capacity.

(2) These rules require that employers of handicapped workers who are being paid sub-minimum wages shall maintain records which substantiate the fact that the handicapped workers are being paid wage rates commensurate with their productive capacity.

(3) These rules establish procedures for an employer of handicapped workers to apply for wage deviation certificates under section 7 of the act.

(4) These rules establish administrative proceedings to grant wage deviation certificates under the act.

History: 1983 AACS.

R 408.772 Definitions.

Rule 2. As used in these rules:

(a) "Act" means the workforce opportunity wage act, 2014 PA 138, MCL 408.411 to 408.424.

(b) "Commensurate wage" means the wage which is proportionate to the prevailing industry wage rate.

(c) "Department" means the department of licensing and regulatory affairs.

(d) "Deviated wage rate" means an hourly wage or piece rate which is below the minimum wage rate prescribed in section 4 of the act, MCL 408.414, is based upon a handicapped worker's productive capacity, and is commensurate with the prevailing industry wage rate.

(e) "Director" means the director of the department or his or her authorized representative.

(f) "Handicapped worker" means an individual whose earning or productive capacity is limited by a physical or mental impairment.

(g) "Locality" means the county, city, village, or township in which the work is performed.

(h) "Prevailing industry wage rate" means the overall average wage rate paid to nonhandicapped workers in industry in the locality for essentially the same type of work.

(i) "Private sector employment" means remunerative employment within a setting other than a rehabilitation facility.

(j) "Rehabilitation facility" means a charitable or nonprofit organization or institution or program including the state and its political subdivisions, agencies, and instrumentalities for the purpose of carrying out a recognized program of habilitation or rehabilitation for handicapped individuals and for providing such individuals with remunerative employment or other occupational habilitation or rehabilitation activity of an educational or therapeutic nature.

(k) "Wage deviation certificate" means a written document issued by the director to either a rehabilitation facility or a private sector employer which authorizes the payment of a deviated wage rate to a group of handicapped workers employed by a rehabilitation facility or to an individual handicapped worker employed by a private sector employer.

History: 1983 AACS; 2016 AACS.

R 408.773 Commensurate wage.

Rule 3. (1) A handicapped worker covered by a wage deviation certificate shall be paid a commensurate wage.

(2) A handicapped worker covered by a wage deviation certificate shall not be paid less than 1 1/2 times his or her commensurate wage rate for all work in excess of the maximum hours as required by section 4a of the act.

History: 1983 AACS.

R 408.774 Prevailing industry wage rate; determination; documentation.

Rule 4. (1) To determine the prevailing industry wage rate for a specific type of work, a rehabilitation facility shall utilize 1 of the following sources:

(a) The state employment service.

(b) Private sector employers in the locality performing similar work.

(c) Recent wages, or wages adjusted for wage increases, which were previously determined by the rehabilitation facility for previous work of a similar nature.

(2) Where the specific type of work is not performed in the private sector in the locality in which the rehabilitation facility is located, the prevailing industry wage rate shall be at least the minimum hourly rate established by the act.

(3) Where a variety of industry wage rates are paid for the work in question, the prevailing wage shall be the overall average wage paid.

(4) A rehabilitation facility shall document efforts to obtain prevailing wage information, and maintain such written documentation for not less than 3 years.

(5) A rehabilitation facility shall review and update prevailing wage information to reflect any changes not less than every 6 months.

History: 1983 AACS.

R 408.775 Time study for piece rate; conduct; purpose; retention of records; review.

Rule 5. (1) Where a prevailing industry piece rate cannot be established in accordance with R 408.774, a rehabilitation facility shall conduct a time study to determine the piece rate to be paid to a handicapped worker. The following steps shall constitute an acceptable time study method for piece rates:

(a) Establish the steps of each type of work to be performed by the handicapped worker.

(b) Have the type of work performed by a nonhandicapped worker for a 50-minute period.

(c) Determine the hourly productivity of the nonhandicapped worker by computing the sum of pieces produced during the 50-minute period.

(d) Determine the piece rate to be paid to the handicapped worker by dividing the prevailing industry hourly wage rate by the hourly productivity of the nonhandicapped worker.

(2) If methods other than those in subrule (1) of this rule are used, the rehabilitation facility shall demonstrate that such methods accurately establish the commensurate wage to be paid to the handicapped worker.

(3) A rehabilitation facility shall retain records of time studies used to determine piece rates for 3 years.

(4) Piece rates shall be reviewed and updated not less than every 6 months to reflect changes in prevailing industry wage rates.

History: 1983 AACS.

R 408.776 Time studies for hourly rates; conduct; retention of records; review.

Rule 6. (1) A rehabilitation facility shall conduct a time study to determine the deviated wage rate to be paid to the handicapped worker. The following steps shall constitute an acceptable time study method:

(a) Establish the prevailing industry wage rate for the work to be performed in accordance with R 408.774.

(b) Establish the steps of each type of work to be performed.

(c) Have the type of work performed by a nonhandicapped worker for a 50-minute period.

(d) Determine the hourly productivity of the nonhandicapped worker by computing the sum of tasks performed during the 50-minute period.

(e) Have the type of work performed by the handicapped worker for a 50-minute period.

(f) Determine the hourly productivity of the handicapped worker by computing the sum of tasks performed during the 50-minute period.

(g) Determine the percentage of the handicapped worker's productive capacity as compared to the hourly productivity established for the nonhandicapped worker.

(h) Determine the hourly rate to be paid to the handicapped worker by multiplying the percentage of the handicapped worker's productive capacity by the established prevailing industry wage rate.

(2) If methods other than those in subrule (1) of this rule are used, the rehabilitation facility shall demonstrate that such methods accurately establish the commensurate wage to be paid to the handicapped worker.

(3) A rehabilitation facility shall retain records of time studies used to determine hourly wages for 3 years.

(4) The handicapped worker's productivity shall be measured no less than every 6 months and the hourly rate shall be adjusted to ensure that the commensurate wage is paid to the handicapped worker.

(5) Hourly wage rates shall be reviewed and updated not less than every 6 months to reflect changes in prevailing industry wages.

History: 1983 AACS.

R 408.777 Wage deviation certificate; application; specifications; duration; issuance and denial; amendment.

Rule 7. (1) An application for a wage deviation certificate shall be filed by a rehabilitation facility or by a private sector employer seeking to pay a deviated wage rate to handicapped workers not covered under section 14(c) of the fair labor standards act of 1938, as amended, 29 U.S.C. 214. A unit of rehabilitation facility having an identifiable program that operates at a different location under separate supervision shall file a separate application for a wage deviation certificate.

(2) A certificate must specify the terms and conditions under which it is granted.

(3) A certificate takes effect on the date issued and is effective for 12 months. Handicapped workers may be paid a deviated wage rate only during the effective period of the certificate.

(4) If a certificate is issued by the director, a copy shall be sent to the rehabilitation facility or private sector employer. If denied, the applicant must be notified in writing of the denial and the reasons for the denial and of the right of appeal provided for in R 408.784 and R 408.785.

(5) The terms of a certificate may be amended upon written request from a rehabilitation facility or private sector employer and subsequent approval by the director.

History: 1983 AACS; 2019 AACS.

R 408.778 Certification of applications for private sector employment.

Rule 8. (1) An application for a wage deviation certificate submitted by a private sector employer not meeting the definition of a rehabilitation facility requires certification by either the Michigan rehabilitation services in the Michigan department of health and human services or the bureau of services for blind persons in the department, or both.

(2) Certification by the bureau of services for blind persons is required if the worker covered under the certificate is legally blind, as determined pursuant to section 1(a) of 1978 PA 260, MCL 393.351(a). All other applicants shall be certified by the Michigan rehabilitation services.

(3) Certification must involve a determination that the productive capacity of the handicapped worker to be covered by the certificate is genuinely impaired by a physical or mental disability and that the handicapped worker is to be paid a commensurate wage.

History: 1983 AACS; 2016 AACS; 2019 AACS.

R 408.779 Criteria for issuance of certificate.

Rule 9. The following criteria as established by the department shall be considered by the director prior to the issuance of a wage deviation certificate:

(a) An applicant's previous and current compliance with the act.

(b) Whether the handicapped workers covered by the certificate are being paid a commensurate wage.

(c) Whether the applicant can document, for each worker covered by the certificate, that the individual's productive capacity is impaired and that the impairment is caused by a physical or mental disability.

History: 1983 AACS; 2016 AACS.

R 408.780 Renewal certificate.

Rule 10. (1) A renewal certificate may be issued by the director to a rehabilitation facility or private sector employer whose current certificate is near expiration provided an application for renewal has been properly filed not less than 60 calendar days prior to the expiration date of the current certificate.

(2) The current certificate shall remain in effect until the application for the renewal has been granted or denied.

(3) The renewal certificate shall take effect on the expiration date of the current certificate and shall remain in effect for 12 months.

(4) Issuance of a renewal certificate shall be contingent upon a finding that the applicant meets the requirements of the act.

History: 1983 AACS.

R 408.781 Temporary certificate.

Rule 11. A temporary certificate may be issued by the director to a rehabilitation facility or private sector employer applying for a certificate. Issuance of a temporary certificate shall be contingent upon a finding by the director that the applicant has provided satisfactory evidence that a commensurate wage will be paid to the handicapped workers covered by the certificate, and that the requirements of the act will be met. A temporary certificate shall be effective for no more than 6 months' duration.

History: 1983 AACS.

R 408.782 Records.

Rule 12. (1) A rehabilitation facility granted a certificate shall maintain, and have available for inspection by the director, records including the following:

(a) Documentation substantiating each handicapped worker's disability.

(b) Total hours worked each pay period.

(c) Total wages paid each pay period.

(d) For employees paid on a piece work basis, the piece rate paid and the total number of units produced at such piece rate for each pay period.

(e) Time studies and calculations made to determine each handicapped worker's productive capacity and the piece rate or hourly rate to be paid each handicapped worker.

(f) Sources used to establish the prevailing industry wage rate.

(2) A private sector employer granted a certificate shall maintain and have available for inspection by the director records to include the following:

(a) Documentation substantiating each handicapped worker's disability.

(b) Total hours worked each pay period.

(c) Total wages paid each pay period.

(d) Certification by Michigan rehabilitation services or the bureau of services for blind persons that the productive capacity of the handicapped worker is genuinely impaired by a physical or mental disability and that the handicapped worker is to be paid a commensurate wage.

(3) The records required in this rule shall be maintained for not less than 3 years.

History: 1983 AACS; 2016 AACS.

R 408.783 Cancellation of certificate.

Rule 13. (1) If it appears that a provision of the act has been violated, the director shall issue a written notice stating the facts or conduct that constitute the alleged violation.

(2) The written notice required in subrule (1) of this rule shall provide the rehabilitation facility or private sector employer with an informal opportunity to demonstrate compliance with the act. Compliance shall be demonstrated within 30 calendar days after the date of the written notice.

(3) If the rehabilitation facility or private sector employer does not demonstrate compliance, the director shall issue a notice of hearing advising of the commencement of proceedings against the rehabilitation facility or private sector employer to determine whether its certificate should be cancelled. The director shall conduct a hearing pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287.

(4) Upon conclusion of the hearing, if it is found that a provision of the act has been violated, the director may cancel the certificate.

History: 1983 AACS; 2016 AACS.

R 408.784 Appeal of decision denying certificate; hearing.

Rule 14. If a decision to deny a certificate is appealed by written objection of a rehabilitation facility or private sector employer to the department within 30 calendar days after receipt of the notice pertaining to the denial, the director shall conduct a hearing pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287.

History: 1983 AACS; 2016 AACS.

R 408.785 Appeal to circuit court; finality of resolution.

Rule 15. (1) A rehabilitation facility or private sector employer aggrieved by the decision of the director following a hearing under R 408.783 and R 408.784 may, within 60 days after date of mailing of the decision, appeal to the circuit court by filing a petition for review pursuant to the provisions of chapter 6 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.301 to 24.306.

(2) A decision by the director to cancel or deny a certificate pursuant to R 408.783 and R 408.784 that is not appealed to circuit court within 60 days after the date of mailing, is final.

History: 1983 AACS; 2016 AACS; 2019 AACS.

R 408.786 Inspections.

Rule 16. (1) The director may enter upon the premises of a rehabilitation facility or private sector employer during normal business hours to conduct inspections to determine whether the rehabilitation facility or private sector employer is in compliance with the act.

(2) Inspection reports shall be utilized in evaluating the issuance of renewal certificates.

History: 1983 AACS.

R 408.787 Rescission.

Rule 17. R 408.751 to R 408.767 of the Michigan Administrative Code, appearing on pages 3178 to 3181 of the 1979 Michigan Administrative Code, are rescinded.

History: 1983 AACS.