

US DEPARTMENT OF LABOR GUIDELINES FOR WORK TRANSITION PROGRAMS

There may be occasions when students will work in community businesses without pay. If students are not paid while performing tasks at a local business, then school districts and employers must comply with guidelines established by the United States Department of Labor and the United States Department of Education -- Office of Special Education and Rehabilitative Services. This policy was developed to ensure that students are afforded the full protection of the Fair Labor Standards Act (FLSA) when receiving community based vocational services.

If conditions are such that a student may legally work in a business without being paid, the student and his or her family/guardian must be fully informed and voluntarily agree to participate in non-paid work. A worksite agreement form should be established for each job site in which a student does not get paid. This will ensure that all parties are knowledgeable of the DOL guidelines and agree to follow them. Note: Completing a “non-paid work exploration form” does not, in itself, make the arrangement either proper or legal.

Students *may be paid* during any stage of the CBWTP. If students are paid, employers must comply with all aspects of the FLSA, including minimum wage.

Students *must be paid* unless their work complies with *all* DOL guidelines that legally provide for unpaid work experiences including:

- “Participants will be youth with physical and/or mental disabilities for whom competitive employment at or above the minimum wage level is not immediately obtainable...”
- “The activities of the students at the community-based placement site do not result in an immediate advantage to the business.”
- “...employees have not been relieved of assigned duties, and the students are not performing services that... are of benefit to the business.”

Please refer to Appendix B for a complete list of the guidelines.

Beyond issues of legality, pay for work performed has the following advantages:

- It honors typical business practices (pay for work performed).
- Pay is a primary motivator for students. (Natural motivators should always be used before artificial ones are considered.)
- It heightens employer expectations (“You get what you pay for.”);
- Pay lessens liability concerns (automatic student coverage by the employer’s worker’s compensation, and general liability).
- It is respectful of student contribution.

Summary: Pay versus no-pay decisions *are not* determined according to the student’s “phase” in the CBWTP. These decisions *are not* made according to personal preferences of the employer, or employment coordinator., or parents. Whether students are paid or not

paid has to do *entirely* with the US. Department of Labor's criteria for the existence of an "employment relationship" as defined in the Fair Labor Standards Act.

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Where ALL of the following criteria are met, the US. Department of Labor will NOT assert an employment relationship for purposes of the Fair Labor Standards Act.

- Participants will be youth 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 on-going support to perform in a work setting.
- Participation will be for vocational exploration, assessment, or training in a community-based placement work site under the general supervision of public school personnel.
- Community-based placements will be clearly defined components of individual education programs developed and designed for the benefit of each student. The statement of needed transition services established for the exploration, assessment, training, or cooperative vocational education components will be included in the student's Individualized Education Program (IEP).
- Information contained in a student's IEP will not have to be made available; however, documentation as to the student's enrollment in the community-based placement program will be made available to the Departments of Labor and Education. The student and the parent or guardian of each student must be fully informed of the IEP and the community-based placement component and have indicated voluntary participation with the understanding that participation in such a component does not entitle the student participant to wages.
- The activities of the students at the community-based placement site do not result in an immediate advantage to the business. The Department of Labor will look at several factors.
 - 1) There has been no displacement of employees, vacant positions have not been filled, employees have not been relieved of assigned duties, and the students are not performing services that, although not ordinarily performed by employees clearly are of benefit to the business.
 - 2) The students are under continued and direct supervision by either representative of the school or by employees of the business.
 - 3) Such placements are made according to the requirements of the student's IEP and not to meet the labor needs of the business.
 - 4) The periods of time spent by the students at any one site or in any clearly distinguishable job classification are specifically limited by the IEP.

- 5) While the existence of an employment relationship will not be determined exclusively on the basis of the number of hours, as a general rule, each component will not exceed the following limitation during any one school year:

Vocational exploration	5 hours per job experienced
Vocational assessment	90 hours per job experienced
Vocational training	120 hours per job experienced

- Students are not entitled to employment at the business at the conclusion of their IEP. However, once a student has become an employee, the student cannot be considered a trainee at that particular community-based placement unless in a clearly distinguishable occupation.

It is important to understand that an employment relationship will exist unless all of the criteria described in this policy guidance are met. Should an employment relationship be determined to exist, participating businesses can be held responsible for full compliance with FLSA, including the child labor provisions.

Businesses and school systems may at any time consider participants to be employees and may structure the program so that the participants are compensated in accordance with the requirements of the Fair Labor Standards Act. Whenever an employment relationship is established, the business may make use of the special minimum wage provisions provided pursuant to section 14(c) of the Act.

We hope that this guidance will help you achieve success in the development of individualized education programs.

DOL CHECKLIST REGARDING NON-PAID WORK EXPLORATION, EVALUATION AND TRAINING

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