

FLEXIBLE FACILITIES PROGRAM (FFP) LABOR STANDARDS WAGE PROVISIONS AND PAYROLL RECORDS GUIDANCE

- A. **Compliance and Certification Parameters** – There is no exception to the FFP required minimum hourly wage rate specification (\$17.75/hour, including the hourly cash wage and fringe benefits values) for self-employed laborers or mechanics, including owners of businesses, sole proprietors, partners, corporate officers, or others. **Laborers and mechanics may not certify to the payment of their own wages except where the laborer or mechanic is the owner of a business working on the site of the work with their own crew.**

The FFP grantee may not accept certified payrolls reporting single or multiple owners (e.g., partners) that certify they have paid to themselves the FFP required minimum hourly wage plus benefits rate. **A sole proprietor may NOT submit a payroll reporting themselves as simply "Owner" and signing the certification as to their own wage payment from "draws" or other payment methods.** Nor may several mechanics submit a payroll reporting themselves as "partners" with one or more certifying as to the payment of their wages or salaries. Such mechanics **must instead be carried on the certified payroll of the contractor or sub-contractor** for whom they are working and with whom they have executed a "contract" for services.

In these cases, maintenance of an accurate accounting of weekly work hours including any overtime hours for such mechanics is essential. Whatever method of compensation computation is utilized (piecemeal, weekly contract draw performance), the amount of weekly compensation divided by the actual hours of work performed for that week must result in an **"effective" hourly wage rate** for that week that is not less than the FFP minimum required hourly wage plus benefits rate. This computation must take into account overtime pay rates (i.e., one and one-half times the base hourly rate) for all hours worked in excess of 40 hours per week, pursuant to the Contract to Work Hours and Safety Standards Act (CWHSSA), where applicable, and pursuant to the Fair Labor Standards Act (FLSA) where CWHSSA is not applicable.

The name, work classification, actual hours of work, effective hourly wage rate, and wage payment for each such mechanic and laborer must be reported and certified on the responsible employer's payroll records. Note that the effective hourly wage rate for such mechanics and laborers may fluctuate from week to week. However, the effective hourly wage rate may not be less than the minimum FFP required minimum hourly wage plus benefits rate.

In any case, where the effective rate falls below the FFP minimum required hourly wage plus benefits rate, the responsible employer must compensate the mechanic at no less than the FFP minimum required hourly wage plus benefits rate.

- B. **Business Owners Working with Their Crew** – Owners of businesses working with their crew on the same FFP-assisted job site **may** certify to the payment of their own wages in conjunction with the wages paid to their employees. This exception to compliance standards **does not** suggest that such owners are not likewise entitled to the FFP minimum required hourly wage plus benefits rate for their labor. Rather, it accepts the wage payment certification on weekly payroll reports by the owner of their own wages as that certification **accompanies** the certification offered for payment of wages of employees. On weekly payroll reports, include the owner's name, identifying them as "owner," and the daily and total hours worked on the FFP project for the week. Omit the Rate of Pay and Amount Earned for the owner.
- C. **Owner-operators of Power Equipment** – Frequently, owner-operators of power equipment (e.g., backhoes, front-end loaders) will contract for services at a rate for both "operator and machine." In these cases, the owner-operator includes liability, equipment maintenance, and salary in an hourly or contract rate for services. Because of the prevalence of such practice and the inherent difficulty in ascribing costs for liability and maintenance costs versus hourly labor salary, a combined ("operator and machine") hourly rate on the responsible contractor's certified payroll may be accepted, provided that such hourly rate may not be less than the FFP required minimum hourly wage plus benefits rate.

Note: **Owner-operators of power equipment**, like self-employed mechanics, **may not submit their own payrolls** certifying to the payment of their own wage, but **instead** must be carried on the responsible contractor's certified payroll report. Include the name, work classification, and actual hours worked. Upon completion of the contract, verify the pay by taking the amount paid to the sub-contractor (documented with copies of all invoices identified for this job) and divide by the hours reported on the certified payrolls. Compare the actual hourly wage plus benefits rate with the FFP required minimum wage rate specifications. If the actual hourly wage plus benefits rate is less, collect and disburse the wage underpayments.

- D. **"Owner Operator" Truck Drivers** – Bona fide **owner-operators of trucks** who are independent contractors are **not subject to** FFP required minimum wage rate specifications and CWHSSA provisions concerning their **own hours** of work and rate(s) of pay. These truck "owner-operators" must still submit certified payroll records but may certify to their own weekly payrolls and do not need to show the hours worked or rates allegedly paid – only the notation "Owner-operator." Any **laborers or mechanics, including truck drivers, employed by the owner-operator/independent contractor are subject to FFP required minimum wage rate specifications and CWHSSA provisions** in the usual manner.

This policy *does not* pertain to owner-operator of other equipment such as backhoes, bulldozers, cranes and scrapers (i.e., power equipment as noted in the paragraph titled "Owner-operators of Power Equipment," above).

- E. **"Contractor's" Truck Drivers** – **Truck drivers employed by contractors or subcontractors are subject to the FFP minimum required wage rate specifications** for all onsite driving time unrelated to offsite delivery (e.g., hauling materials on the site of the work from one location to another), for any time spent transporting "significant portions" of public works from secondary construction sites, for any time spent transporting materials to or from adjacent or virtually adjacent dedicated support sites, as well as for any onsite time related to offsite delivery if such time is not *de minimis*. Where workers spend a significant portion of their day or week onsite, short periods of time that in isolation might be considered *de minimis* may be added together. The total amount of time a driver spends on the site of the work during a typical day or workweek—not only the amount of time that each delivery takes—is relevant to a determination of whether the onsite time is *de minimis*.

De minimus may be interpreted as time spent on the job site that is not sufficient nor consequential enough to be tracked as an itemizable job function (i.e., "a few minutes"). Any single visit at the project site that is more than *de minimus* (more than a few minutes) is subject to the FFP required minimum wage rate specifications. Contractors must report hours worked and pay at least the FFP required minimum wage plus benefits hourly rate for any time the truck driver spends on the project site if the driver is making multiple trips throughout the day that cumulatively challenge a *de minimus* determination. If a series of project site visits by the truck driver that individually are each a *de minimus* amount of time but **cumulatively** exceed 20% of the driver's hours in the same day, the employee's time on-site that day is subject to the FFP required minimum wage rate specifications. If a series of project site visits by the truck driver that individually are each a *de minimus* amount of time but **cumulatively** exceed 20% of the driver's hours in the same work week, the employee's time on-site time that week is subject to the FFP required minimum wage rate specifications.

- F. **Helpers** – Workers in a "Helper" job classification are subject to the FFP required minimum wage rate specifications.
- G. **Relatives** – There are no exceptions made in the enforcement of FFP minimum required hourly wage rate applicability on the basis of family relationship for relatives who are performing the work of laborers or mechanics. Work performed by relatives is subject to the FFP required minimum wage rate specifications.
- H. **Volunteers** – A exception to paying the FFP minimum required hourly wage plus benefits rate is permitted for volunteers, contingent upon the volunteer **not otherwise being employed at any time in the work (by their employer) for which the individual is volunteering**. Contact the DOA DEHCR project representative for the FFP project for more details if the community plans on using volunteers on the construction site.

- I. **Employees of a Governmental Body** – The FFP minimum required hourly wage rate specifications and CWHSSA provisions are not required/applicable for employees of a state or political subdivision of a state (i.e., state, county, city, village or town employees working on the FFP project) but shall apply to employees of a private/non-government contractor who is sub-contractor of the state or political subdivision. The FLSA wage and overtime provisions still apply to both government and non-government entity employees.
- J. **Laborers and Mechanics – Definition** – The terms "laborers" and "mechanics" are construed to include at least those workers whose duties are manual or physical in nature as distinguished from mental or managerial. Since the classifications of laborers and mechanics are both subject to the FFP required minimum wage rate specifications, there is ordinarily no need to distinguish between laborers and mechanics. However, **mechanics are generally considered to include any worker who uses tools, or who is performing the work of a trade.**
- K. **Supply and Installation Contracts** –The manufacturing or furnishing of materials, articles, supplies, or equipment is not subject to FFP required minimum wage rate specifications and CWHSSA provisions *unless* conducted in connection with **and at the site of the project**, or in a temporary plant set up elsewhere solely to meet the needs of the project.

Installation work performed for the project in conjunction with an equipment supply contract is subject to the FFP required minimum wage rate specifications where it involves more than an incidental amount of construction activity. Whether installation work involves more than an incidental amount of construction activity depends on the specific circumstances of each case. Factors requiring consideration include the nature of the prime contract work; the type of work performed by the employees installing the equipment (e.g., the techniques, materials and equipment used and the skills required for its performance); the extent to which structural modifications to buildings are needed to accommodate the equipment (e.g., widening entrances, relocating walls, installing wiring); and the cost of the installation work, either in terms of absolute amount or in relation to the cost of the equipment and the total project cost.

- L. **Site of Work** – The “site of work” is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed and to other adjacent or nearby property used by the contractor in such construction which can reasonably be said to be included in the “site” because of proximity. **Operations of a commercial or material supplier established in the proximity of but not on the active site of work prior to the opening of bids are not subject to the FFP required minimum wage rate specifications and CWHSSA provisions, even if dedicated exclusively to the FFP project for a time.**
- M. **Fringe Benefits – Funded Plans** – A contractor may credit contributions for “bona fide” fringe benefits regardless of whether the USDOL has found the particular benefits to be prevailing in the area. Such fringe benefits must be “bona fide.” Ordinarily, bona fide benefits are those common to the construction industry and are paid directly to the employee in cash or into a fund, plan, or program on the employee’s behalf. Contractors may take credit for contributions made under such conventional plans without requesting approval of the USDOL.
- N. **Fringe Benefits – Unfunded Plans** – Where fringe benefit plans are not of the conventional type, it will be necessary for the USDOL to determine if the benefits are “bona fide.” **Contractors seeking approval of unfunded plans must obtain approval from the USDOL and DOA-DEHCR.**

O. Fringe Benefits – General

1. Contributions to funded plans must be made at least quarterly.
2. When the cash paid and the per-hour contribution for benefits do not equal the FFP required minimum wage plus benefits rate, the difference must be paid to the employee in cash.
3. Fringe benefits must be paid for straight time and overtime. However, **fringe benefits are not to be included when computing the overtime rate.**
4. Vacation and sick leave plans are generally unfunded, paid from the contractor’s own account, and **require USDOL and DOA-DEHCR approval** before a contractor takes credit toward meeting the fringe benefit obligation.

5. In determining the cash equivalent credit for fringe benefits payments, the period of time to be used is the period covered by the contribution. For example, if an employer contributes to a plan on a weekly basis, the total hours worked each week (FFP project work hours and non-FFP project work hours) by each employee should be divided into the contribution made by the employer.
6. Acceptable fringe benefits include the following:
 - medical or hospital care;
 - pensions on retirement or death;
 - compensation for injuries or illness resulting from occupational activity; or insurance to provide any of the foregoing,
 - unemployment benefit wages,
 - life insurance,
 - disability and sickness insurance,
 - accident insurance,
 - vacation and holiday pay,
 - defrayment of cost of apprenticeship or other similar programs, or
 - other bona fide fringe benefits; but only where the contractor to sub-contractor is not required by other federal, state, or local law to provide any of such benefits.

Fringe benefits that a contractor or sub-contractor is obligated to provide under other federal, state, or local law are to be excluded from the hourly wage plus fringe benefits rate calculation (e.g., social security deduction, unemployment deduction, worker's compensation, etc.). Payments for travel and subsistence, or to industry promotion funds are not typically deemed fringe benefits.

No type of fringe benefits is eligible for consideration as an unfunded plan unless:

- a. It could be reasonably anticipated to provide benefits described;
- b. It represents a commitment that can be legally enforced;
- c. It is carried out under a financially responsible plan or program; and
- d. The plan or program providing the benefits has been communicated in writing to the laborers and mechanics affected.

P. **Non-Covered Job Classifications** – Workers performing the normal duties of the following job classifications are **not subject to FFP minimum required wage rate specifications**:

1. Project Superintendent.
2. Project Engineer.
3. Project Foreman, as distinguished from a working foreman (working foremen, who devote more than 20% of their time during the workweek to mechanic or laborer duties, are laborers and mechanics for the time spent and must be paid the applicable rate for the hours so worked).
4. Watchman.
5. Water Carrier.
6. Messenger, Clerical Workers.

Q. **Piecework** – Roofers and dry-wall hangers are sometimes paid by piecework. Piecework is work paid for at a fixed rate (piece rate) per piece of work done. The effective wage rate must be at least the FFP minimum required hourly wage rate.