# Part 397: Limitations on the use of subminimum wage for students with disabilities through age 21

The final regulations that will govern the implementation of Title I of the Rehabilitation Act, as amended by the Workforce Innovation and Opportunity Act (WIOA), were published on June 30, 2016. You can find the document here: <http://www2.ed.gov/about/offices/list/osers/rsa/wioa-vr-final-rule.pdf>.

Part 397, which is the portion of the rule that places limitations on the use of subminimum wage, begins on page 954. An earlier section of the rule document, on pages 478-591, provides the Rehabilitation Services Administration responses to public comments on the draft regulations as well as its rationale for the construction of the final regulations.

A key goal of Part 397 is to encourage access to competitive, integrated employment – and to reduce the incidence of individuals with disabilities working in jobs or work training experiences that pay less than the minimum wage. The effective date for Part 397 was Friday, July 22.

# The new requirements

1. Part 397 does not prohibit students from *choosing* to be employed in a subminimum wage job. But it does set forth requirements that must be satisfied before a student with a disability can accept such employment.
2. The implementation of these new requirements applies only to students (through age 21) who are known to be seeking subminimum wage jobs. The new requirements do not restrict access to jobs or work training that pay the minimum wage or more**.**
3. Before they can be paid subminimum wage, students with disabilities (through age 21) who are *known to be seeking* employment in a subminimum wage job must prove that they've fulfilled all of the following requirements:
4. Participated in Pre-employment Transition Services while still in high school and eligible for services under IDEA.
5. Applied for VR and determined ineligible or found eligible but unsuccessful in competitive, integrated employment and their VRS case was closed.
6. Received career counseling, information, and referral to resources that could assist in securing competitive, integrated employment.
7. Part 397 prohibits local school districts and state educational agencies from entering into a contract for transition services that includes working for less than the minimum wage. (*Part 397.31, pp. 973-974 of the regulations*).
8. VRS is responsible for developing and implementing a process to document completion of the required activities outlined in #3 above and must provide that documentation to the student upon completion of those required activities. Entities (CRPs, businesses, schools) that hold special wage certificates under FLSA 14(c) must request and retain copies of that documentation.
9. VRS, or its contracted designee, is authorized (but not required) to review the documentation maintained by entities holding special wage certificates under FLSA 14(c).
10. VRS is NOT given any jurisdiction over the requirements on entities holding special minimum wage certificates under FLSA 14(c).

# VRS Implementation Plan

1. VRS staff and special education directors in all Minnesota high schools will develop a communication plan to explain the new requirements to students, parents, guardians, and teachers. VRS Leadership will make a presentation on the new requirements at the Statewide Special Education Directors meeting on September 9. Materials developed for that presentation will be disseminated statewide.
2. VRS staff, along with special education directors and teachers, will identify students who are known to be seeking employment at subminimum wage jobs, focusing first on students who will graduate out of a school or transition program within the next 12 months. VRS will work collaboratively with these students and their families, school staff, and county case managers to explain the new requirements and develop an individualized plan that meets those requirements.
3. Students or their parent or guardian may refuse to apply for vocational rehabilitation services. But refusing to participate in the required activities or opting out of the vocational rehabilitation process entirely will make the student ineligible for subminimum wage employment. As stated on page 526 of the regulatory guidance:

*If a youth chooses not to participate in the activities required by section 511 of the Act and final part 397, or chooses to opt out of the vocational rehabilitation process* *entirely, such a choice will impact the permissibility of the youth to work at subminimum wage and preclude him or her from obtaining subminimum employment given the limitations imposed by section 511 of the Act and final part 397. Accordingly, [VR agencies] should inform youth with disabilities and/or their guardians of the youth’s ineligibility for subminimum wage employment if he or she refuses to participate in the required activities.*

1. It is important to reiterate that VRS has no enforcement authority over an entity’s compliance with requirements tied to a special wage certificate. Even though VR is directed to notify the student of his/her ineligibility for subminimum wage employment, VR has no authority to enforce that requirement. That authority rests with DOL’s Wage and Hour Division. This is verified on page 573 of the regulatory guidance:

*With regard to entities holding 14c certificates under the FLSA, all authority to impose requirements (e.g., consequences for failure to comply including suspension or revocation of the special wage certificate) rests with the Department of Labor and are beyond the scope of these final regulations.*

# Implementation Timeline

1. Part 397 became effective last Friday, July 22, 2016. VRS is finalizing our implementation plans and developing projections related to future service capacity and staffing needs.
2. Implementation of requirements for students known to be seeking subminimum wage will begin in earnest as the 2016-17 school year gets underway. VRS staff will be reaching out directly to special education directors and teachers to identify students known to be seeking subminimum wage jobs. As stated above, the first priority will be students expected to graduate in Spring 2017.

# Questions?

While this bulletin is intended to provide clarity about the new WIOA requirements and VRS’s implementation plans and timelines, we expect that you may still have questions. Please direct those questions to VRS.Customerservice@state.mn.us and we will do our best to respond as quickly as possible.

Thanks for your continued partnership in assisting Minnesotans with disabilities to achieve their goals for competitive, integrated employment.