

COLORADO DEPARTMENT OF HUMAN SERVICES 1575 SHERMAN ST., DENVER, COLORADO 80203-1714 AGENCY LETTER	NUMBER: TCW-09-03-I
DIVISION OR OFFICE: Self-Sufficiency and Independence	CROSS REFERENCE NUMBER:
PROGRAM AREA: TANF/Colorado Works – TCW	DATE: September 14, 2009 DIVISION DIRECTOR: Kevin Richards
TITLE: Application of the Fair Labor Standards Act (FLSA) to Colorado Works/TANF work activities. TYPE: I – Information	DEPUTY EXECUTIVE DIRECTOR: Pauline Burton

Purpose:

The purpose of this Agency Letter is to notify Colorado county departments of social/human services of the change in the definitions of worksite training experiences in the Colorado Works program. This Agency Letter will also provide additional clarification of how the Fair Labor Standards Act (FLSA) shall be applied to work activities for both the FLSA payment and for the work participation rate deeming provision allowed under the Deficit Reduction Act (DRA) of 2005.

Background:

The U. S. Department of Labor (USDOL) issued guidance that FLSA applies to Temporary Assistance for Needy Families (TANF) work activities; examples of those work activities include community service and community work experience programs/activities. Individuals who are engaged in those work activities will now be considered “employees” under the Fair Labor Standards Act’s (FLSA) broad definition. As a result of this designation, compensation at the higher of the state or federal minimum wage above the basic cash and food assistance grant amounts will be required.

Information:

As of October 1, 2008, work activities such as community service and community work experience are no longer eligible for the county to designate as “training.” This change was a result of the approval of Colorado’s Work Verification Plan. In the past, if job duties on a particular worksite met a minimum set of standards, those duties would be considered training and the individual assigned to that training was considered a student rather than an employee for the purpose of subjecting them to provisions of the Fair Labor Standards Act (FLSA). Counties may still chose to assist clients with short-term training as a part of some work activities subject to FLSA and as allowed in Colorado’s Work Verification Plan, but those individuals will be considered employees.

In addition, the deeming provision that is a part of section II (b) of Colorado’s Work Verification Plan requires that the FLSA calculation be used with the greater of the state or federal minimum wage. The result of that FLSA calculation results in the number of hours in which the work-eligible individual is required to participate for the month to satisfy the sum of both the TANF/Colorado Works and Food Assistance grant for that month. If the result of that calculation is less than 20 average hours per week, the individual is considered to have satisfied the first 20 average weekly core/primary work activity hours toward the federal work participation rate (see example below under FLSA deeming). Additionally, any hours worked above the outcome of the FLSA calculation in community service or community work experience using the higher of the

state or federal minimum wage must be paid at minimum wage (see example below under FLSA payment).

FLSA payment: The following is an example of the calculation that is used to determine the correct compensation for both two-parent and single parent families engaged in either work experience or community service work activities: This calculation also illustrates how the deeming provision is applied to the work participation rate.

EXAMPLE

Basic Cash Assistance (BCA) received	\$364.00
Food Stamp Benefit (FS)	\$250.00
TOTAL (BCA + FS)	<u>\$614.00</u>
Divided by Colorado minimum wage as of 1/1/09	<u>\$7.28</u>
Number of hours required for the month	<u>84 hours</u>

In the example above, any hours that are completed in these work activities beyond 84 per month will be noted as “overage hours” in the attendance screen in Colorado Benefits Management System (CBMS). Those “overage hours” must be compensated through the FLSA payment triggered out of work programs in CBMS. The payment must be made in the same reporting month as the entry of the hours that resulted in the need for payment. For example, if the hours were completed in March and reported in April for March, the FLSA payment must be made from CBMS work programs by the last working day of April. FLSA payments are not optional and are not contingent on compliance or sanction. If the hours were completed and there is verification of completion in the file based on work verification procedures, participants MUST be compensated fairly based on the calculation above with current minimum wage.

FLSA deeming: The following is an example of the calculation that is used to determine whether a household will be deemed as engaged for the purpose of meeting work participation rates. In the example above, the 84 hours is broken down to determine the average weekly hours through the following calculation:

Total number of monthly hours required	<u>84 hours</u>
Multiplied by the number of days in the week	7
Divided by the number of days in the reporting month	(31) or 30 or 29
Average weekly hours	(19)

In this example, the 19 average weekly hours would automatically translate to 20 average weekly hours through the deeming provision and the first 20 hours toward the core/primary hour requirement for the federal work participation rate. CBMS is currently coded to recognize this deeming translation through the FLSA calculation and the work participation reports have an indicator of whether a household met the work participation rate through the deeming provision of the DRA. Colorado Works cannot use this deeming provision under FLSA when an individual is not considered an employee because we are disallowed from subjecting non-employees to the FLSA that provides us with this ability. These are the reasons why we can no longer recognize work experience and community service as training and work eligible individuals as students engaged in that training for work experience and community service activities.

This FLSA deeming calculation **should not** be used to determine the maximum number of hours in which work eligible individuals should participate in any work activities subject to FLSA in an effort to avoid payment under FLSA. The number of hours that work eligible individuals are

assigned to participate in their Individual Responsibility Contract (IRC) should instead be determined as a result of a thorough assessment and negotiated with the participant.

Effective Date:

September 1, 2009

Supersedes:

Agency Letter: TCW-99-5-A
Agency Letter TCW-07-01-P

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