

**EMERGING PRACTICES:**

**WAGE POLICIES AND PRACTICES FOR THE PRISON  
INDUSTRIES ENHANCEMENT CERTIFICATION PROGRAM  
(PIECP)**

**PRE-PUBLICATION COPY**

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## INTRODUCTION

Compliance with wage requirements is critical to the continuing integrity of the Prison Industries Enhancement Certification Program (PIECP). PIECP operations must co-exist with private sector businesses in their localities by adjusting to the local economic climate in which they operate. PIECP Certificate Holders are required by the Bureau of Justice Assistance (BJA) to protect private sector labor and business from unfair competition. All of the potential beneficiaries of a successful PIECP operation--the correctional industry, the department of corrections, inmates, private sector partners, tax payers, victims, and inmate family members (as well as the community and the economy at large)--have a keen interest in ensuring that the process used to determine wages for work performed by PIECP inmates is fair, accurate, and timely.

The key to this economic balancing act is the State wage-setting agency which determines what wage is fair and whether or not community workers and businesses will be adversely affected by the PIECP operation. The importance of an objective, arms-length relationship between the Certificate Holder and its State wage-setting agency to protect competing companies and free world labor cannot be overemphasized.

BJA has designed its wage requirements to encourage and educate State departments of economic security (DES) to have the strongest voice in determining the appropriate wage for PIECP inmate workers. Determining that wage is, however, a complex and challenging task. In fact, it has been the most difficult task faced by PIECP participants since the program began more than 20 years ago.

BJA has consistently held that Certificate Holders must pay wages to inmate workers at the rate defined in the program's underlying statutory language: a rate which is "not less than that paid for work of a similar nature in the locality in which the work is performed." [18 U.S.C. 1761 (c)]. While BJA has described the PIECP wage requirement as both "prevailing" and "comparable," the underlying definition of the wage has never varied from the statutory requirement: no less than the wage paid to others in the locality who do similar work.

To protect competing companies and free world labor, BJA asks its PIECP Certificate Holders to use their State DES to determine both wage rates and displacement projections and assessments. In addition, Certificate Holders must notify local businesses and labor organizations--in advance of actual start-up--of their intentions to begin PIECP operations. Competing companies and civilian workers are therefore made aware of the entry of prison-based businesses into their areas and local standards and conditions are taken into account in setting the wage for PIECP inmate workers.

In practice, PIECP wages tend to be set at, or slightly above, the Federal minimum wage (currently \$5.15 per hour), reflecting the entry level, labor intensive nature of PIECP work. Wages are determined when Certificate Holders ask their DES for specific wages or wage ranges for each of the anticipated inmate job functions, and then set their starting wages at or above that wage rate or within that wage range. Some Certificate Holders have formal wage plans that allow for increases based upon inmate productivity, longevity, and performance; others do not. The Statute and 1999 Guideline do not require such wage plans, but in the interest of fairness, BJA encourages their development and use.

BJA published a new program Guideline in 1999 (Federal Register, Vol. 64. No. 66, Wednesday, April 7, 1999, pp. 17000–17014) which represents a significant step forward in defining PIECP wage policy. In response to requests from various stakeholders, ten separate wage issues were addressed<sup>1</sup>. The 1999 Guideline clarified and modified earlier wage policy.

Compliance assessments conducted for BJA by the Correctional Industries Association (CIA) in 2000-2001, which measured performance under the 1999 Guideline for the first time, revealed that wages remain the most difficult part of the program for Certificate Holders to understand and implement. PIECP Certificate Holders continue to ask for guidance from BJA about the wage requirement. Directors of correctional industry programs want to know more precisely what wage practices are and are not allowable under the PIECP and to understand the rationale for BJA's wage determination policies.

This paper is an attempt to respond to that need. Part I surveys the history of BJA's wage policy over time, summarizes the range of practices used by current Certificate Holders, and identifies the types of problems discovered during the 2000-2001 PIECP assessments. A discussion of how to set wages under current BJA wage policies is also included. Guidance is provided on how to establish and document an effective, objective, and arms-length relationship with the DES. Part II describes seven specific wage issues and identifies practices approved by BJA. Five sample cases demonstrate the kinds of problems and solutions that were identified during BJA's 2000-2001 compliance assessments. The positions taken in this paper reflect the PIECP Statute and the 1999 Guideline, but the Statute and the Guideline themselves remain the two official sources of guidance for the PIECP.

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<sup>1</sup> The full text of the Guideline's wage provisions is found in Appendix A of this paper.

## PART 1: THE WAGE PICTURE DESCRIBED

### HISTORY

The PIECP Federal legislation was enacted in December 1979. Since that time, BJA has published two administrative Guidelines which amplify program wage policy, one in 1985 (Federal Register, Vol. 50 No. 61, Friday, March 29, 1985, pp. 12661–12664) and one in 1999 (*supra*, p. 5). The 1999 Guideline includes considerably more material on wages than its predecessor and was developed by BJA in response to requests for additional guidance from PIECP Certificate Holders and other stakeholders.

BJA was interested in providing as much information as possible to encourage informed wage decisions. Several meetings for Certificate Holders were held to solicit input during the development of the 1999 Guideline. Certificate Holders and outside parties potentially affected by PIECP projects were provided with an additional opportunity to comment on the new Guideline through the formal Federal Register comment and response process.

The differences between the two Guidelines with regard to wages were significant in terms of their impact on PIECP projects. The 1985 Guideline had one main requirement: applicants were to request that the appropriate State agency which normally determines wage rates (usually the DES) verify that the proposed wages were comparable to wages paid for work of a similar nature in the locality in which the project was located. The only other explicit wage requirement (set forth in BJA's certification and designation paperwork) was that wages were not to fall below the Federal minimum wage, in accordance with the Fair Labor Standards Act (29 U.S.C. 206). In practice, some Certificate Holders interpreted this to mean that if they could not get a response from their State wage-setting agency specific to the rural areas typical of prison and jail locations, then they could set the wage at the Federal minimum wage by default.

The 1999 Guideline incorporated the 1985 requirements and added several new provisions intended to clarify and strengthen the wage requirement and make its implementation more uniform:

- **PIECP wages are to continue to be set through the State DES. The Federal minimum wage is explicitly identified as the wage floor for the program.**
  
- **If the Certificate Holder is unable obtain wage verification from the State DES, it is to derive its own prevailing wage.** A suggested methodology for "self-determination" of the prevailing wage rate was provided, including a request that the DES concur on the self-determined wage.<sup>2</sup> This means that Certificate Holders can no longer set the wage at the Federal minimum wage without providing a fact-based, independently-verifiable rationale demonstrating comparable wage rates in the locality. According to the

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<sup>2</sup> The Certificate Holder is to retain on file, for BJA review, (a) relevant wage data from a sufficient number of competitors in the locality; (b) data analyses for determining a reasonable prevailing wage result; and (c) if possible, a written assessment of the reasonableness of the resulting prevailing wage determination by an appropriate state agency which normally determines wage rates.

Guideline, “Availability of the self-determination option prevents CACs from paying a Federal minimum wage—the lowest possible PIECP wage— indefinitely, when payment of such a wage rate is unwarranted and the state remains non-responsive to wage determination requests.”

- **The PIECP inmate wage is directly tied to the displacement requirement.** When making PIECP prevailing wage verifications and annual re-verifications, the responsible State agency should now recommend the “utilization of a non-inmate wage scale which would not result in the displacement of non-inmate workers performing similar work in the relevant locality.” This means that each year when wages are re-verified, the DES should re-estimate the PIECP wage based on actual wage and employment changes in the locality.
- **All PIECP inmate workers performing “notable tasks” are to receive the prevailing wage.** Notable tasks are defined as “those tasks necessary to produce goods for and/or transport goods in interstate commerce.” This provision means, for example, that refuse removal for a garment cutting operation might be a full-time job which should be compensated at the prevailing wage rate, whereas refuse removal for a radio assembly plant might not need to be compensated at that level, given its intermittent nature. Prior to 1999, Certificate Holders were not required to make this determination.
- **The practice of overtime pay is made explicit.** Overtime at time-and-a-half is to be paid to PIECP workers for time worked in excess of 40 hours per week.
- **A formula for calculating piece work wage rates is included to insure that inmate worker wages are properly set and never fall below the Federal minimum wage.** PIECP projects are asked to convert piece work wages into comparable hourly wage rates and to eliminate any sub-minimum wage work that may have been condoned in error under the 1985 Guideline. As a result, PIECP projects whose inmate workers are compensated at a rate below the Federal minimum wage are not permitted. (Of course, with piece work as with any other type of work, the prevailing wage is required, not the Federal minimum wage, unless the prevailing wage is the Federal minimum wage.)

In setting wage policy, BJA’s focus is primarily on the statutory requirements that are designed to promote fairness for competitors and free world labor. Its goal is to insure a level playing field between comparable inmate and non-inmate business operations, as the program’s underlying legislation requires. BJA’s three-fold task is: (1) to ensure that PIECP inmates do not unfairly compete with free world businesses and civilian workers; (2) to provide support and encouragement to its Certificate Holders as they compete in the business world; and (3) to make sure that PIECP inmate workers are treated in accordance with the 1999 Guideline.

## **PROBLEMS IDENTIFIED IN THE 2000-2001 ASSESSMENTS**

PIECP Certificate Holders have, as a group, risen to the challenge of complying with the comprehensive 1999 PIECP Guideline and strengthened their programs in the process. The evolution of the PIECP is marked by increasing awareness of the ways in which PIECP CACs must cooperate with the communities in which they are located. In response, the Certificate Holders have made a concerted effort to develop private sector operations that are in compliance with all PIECP requirements. Today, PIECP Certificate Holders are more aware of their impact and doing a better job than ever before in meeting the expectations of various stakeholders and competitors.

The findings of the compliance assessments conducted by the CIA in 2000-2001 confirmed this overall advance, but revealed a number of wage problems that reflected some misunderstanding in the area of wages. Wage-related problems identified during the assessments sometimes stemmed from the Certificate Holder's failure to understand or implement various 1999 Guideline requirements; at other times, there seemed to be a misunderstanding of the requirement on the part of the State DES. Often, the Certificate Holder was dissatisfied with the fit between the work actually being performed by PIECP inmate workers and the job descriptions used by the DES to determine wages.

Specific problems were uncovered in several areas:

- ❑ Insufficient documentation of the prevailing wage or wage range by the State DES
- ❑ Failure to use wage data that was received from the State wage-setting agency
- ❑ "training wage" (whether or not a training wage can be used)
- ❑ displacement (confusion over definitions of locality as well as how to tie displacement to wages)
- ❑ split wages (under what circumstances it can be done and how it should be documented and verified)
- ❑ self-determined wages (how they should be determined and who must sign-off on the decision)
- ❑ time-and-a-half for overtime (how and when to calculate)

## **HOW THE SYSTEM SHOULD WORK**

### **Establishing Wages for a New Cost Accounting Center (CAC)**

The 1999 PIECP Guideline continues the practice of requiring the involvement of the appropriate State wage-setting agency in setting PIECP wages. BJA believes that this *should be* a State-level decision, not a Federal decision, given the variety in local economic conditions that must be considered. Certificate Holders are asked to set PIECP wages at levels acceptable to their State DES. The process must be a collaborative effort between the Certificate Holder and the DES. Interaction between



these two parties is essential if the wage determination is to be more than perfunctory; documentation of its objectivity is essential if the Certificate Holder is to be taken seriously by the parties affected by the wage setting process. The Certificate Holder should assist the DES in making effective and accurate wage and displacement determinations since success under PIECP means both (a) meeting the requirements of the law, and (b) meeting the requirements of the marketplace and public opinion.

PIECP wage determinations are made at the CAC level.<sup>3</sup> For each CAC they wish to initiate, Certificate Holders must provide evidence, in advance of start-up, that the wage they will pay is within the range identified by the State wage-setting agency as “not less than that paid for work of a similar nature in the locality in which the work is to be performed.” They do this either by securing a written wage statement from their State DES or by “self-determining” the wage or wage range and then asking the DES to concur with their determination. Under the 1999 Guideline, Certificate Holders complete the wage-setting process by notifying BJA of their intention to start a CAC and under what wage and other employment conditions they will do so. Certificate Holders “designate” and “undesignate” CACs at their own discretion; BJA reviews wage provisions as part of the overall designation process to ensure compliance with the Statute and 1999 Guideline.<sup>4</sup>

To further ensure that its CACs will not undercut local business and labor, BJA asks its Certificate Holders to show written evidence of a formal non-displacement assessment and projection from the State wage-setting agency, along with a specific promise from the private sector partner involved not to displace its own workers in favor of PIECP workers. Knowing that any new PIECP CAC inevitably has some impact on the local economic community, and that project initiation is the point of maximum control for BJA, the 1999 Guideline requires the Certificate Holder to obtain a formal displacement assessment and projection from its State DES at the time a CAC is designated.

At the time of their designation, CACs are required not to displace currently employed and currently unemployed similarly skilled non-inmate workers in the locality where the CAC is located. Recognizing the need to both encourage CACs to thrive and to protect CAC competitors, the 1999 Guideline states: “While compliance is a continuing CAC responsibility, a violation of the non-displacement requirement is more likely to occur and is more discernable just prior to and immediately following CAC implementation than thereafter. For this reason, BJA will scrutinize CAC compliance with this provision just prior to and within one year following CAC implementation.”

### **Annual Wage Re-verifications**

Finally, because non-displacement is an on-going responsibility, it must be considered each year as part of the annual wage re-verification process. BJA asks that

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<sup>3</sup> Cost Accounting Center is the term BJA uses to describe each distinct business operation under the PIECP. Wages must be determined for each CAC.

<sup>4</sup> One frequently asked question is how a Certificate Holder should know what changes in conditions in an existing CAC make it necessary to open a new CAC or modify the existing CAC. BJA requires either a special determination or a complete re-designation when: (1) a significantly different product is to be produced; (2) a change in location is involved; or (3) additional components or processes are being added to an existing CAC that potentially have adverse environmental impacts. All of these circumstances would trigger the need for a new verification of wages, non-displacement status, and NEPA compliance, as well as the notification of local business and labor representatives.

its Certificate Holders request annual written wage updates from the State DES before the anniversary date of start-up so that the new wage, should there be a change, can be implemented on the anniversary of the start-up date. That date is the last possible date on which the required wage change can be implemented. While no additional formal displacement assessments and projections are required at that time, the DES is asked to make its wage re-verification within the context of displacement:

When making PIECP prevailing wage verifications and annual re-verifications, the responsible state agency should recommend the utilization of a non-inmate wage scale which will not result in the displacement of non-inmate workers performing similar work in the relevant locality.

For annual wage re-verifications, BJA assumes that if the wage is appropriately set, displacement of civilian workers will not occur and that therefore, the DES need not conduct an annual re-assessment of displacement itself. In practice this means that the wage-setting agency should recommend a wage or wage range that acknowledges current market conditions. This consideration differs from the original displacement assessment in that it focuses on changes in employment conditions occurring *after* the establishment of the CAC and asks the DES to consider PIECP workers in relation to similar workers already employed in the community.<sup>5</sup> Certificate Holders found in non-compliance with this annual update provision could face back-pay obligations for inmate workers involved in the CAC.

### **Using Department of Economic Security (DES) Data**

BJA was not the only Federal agency making changes in wage policies and procedures in the late 1990s. State offices of economic security also changed the way they calculate wage rates and present wage information to their constituents because a new Federal program, The Occupational Employment Statistics Program (OES), reorganized the way State wage data was collected and analyzed.

According to the Bureau of Labor Statistics (BLS), the new OES program:

- Collects data on wage and salary workers in nonfarm establishments in order to produce employment and wage estimates for over 700 occupations. The OES program produces these occupational estimates by geographic area and by industry.
- Makes its geographic estimates at the National, State, and Metropolitan Area levels.
- Is a Federal-State cooperative program between the Bureau of Labor Statistics and State Employment Security Agencies (SESAs) from all fifty states
- Produces occupational employment and wage rate estimates at the national level through BLS-Washington, using data from the fifty States and the District of Columbia...<sup>6</sup>

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<sup>5</sup> The Certificate Holder should also reassure itself that no displacement of employees of the private sector partner itself has occurred or will occur in the next year.

<sup>6</sup> See: [www.bls.gov/oes\\_emp.html](http://www.bls.gov/oes_emp.html) for an overview of the OES program.

- Began using the new Office of Management and Budget (OMB) Standard Occupational Classification (SOC) system in 1999.<sup>7</sup>

In effect, then, the Bureau of Labor Statistics now requires all fifty states to collect occupational wage data statistics, using the definitions for job descriptions supplied by the BLS, and submit the data to Washington-BLS in a format that includes (or soon will include) the State as a whole and Metropolitan Areas.<sup>8</sup> The data is updated every two years. As a result, government agencies and private industries now or soon will have comparable data, across all fifty states, for a variety of employment-related purposes.

How does this change in data collection and presentation affect PIECP Certificate Holders? First, and most important, because the BLS wage data is supplied by the states themselves, under a cooperative agreement between BLS and the states, if a given state does not have its own website, the relevant wage information is available by going directly to the BLS site.<sup>9</sup> Many state sites provide a direct computer link to their own page on the BLS site. Certificate Holders therefore have access to the information they need to make PIECP wage determinations whether or not their State DES responds to their requests.

Second, this change in methodology by State DES agencies may mean Certificate Holders will have to adjust to new definitions of “locality.” The tailored wage determinations specific to prison locations that most PIECP Certificate Holders have been able to count upon, may no longer be available. Instead, State employment and wage data may now be organized by geographical regions and occupations that differ somewhat from those provided in the past.

Many Certificate Holders have learned to use the new system and continue to meet BJA’s wage-setting requirements with relative ease. They have accepted wage data derived from the geographic areas and occupations used to compile the OES data. Some State wage-setting agencies continue to produce responses to requests for wage data specific to the locality in which the prison or jail is located and the specific tasks the inmate workers perform. A few Certificate Holders have learned to “self-determine” wages (which then should be approved by the State economic security agency itself), because their DES agencies cannot or will not provide the information necessary to make a sound wage determination for a given locality. One Certificate Holder has even trained its own employees to use the same software used by its DES so that it can prepare its own analyses which are then reviewed by the DES.

While statistical data is not alone determinative for wage setting purposes, it does provide a benchmark for comparing PIECP wages to wages paid to non-inmate workers doing the same kind of work in the relevant locality. The PIECP statute is clear that PIECP wages shall not undercut wages paid to free workers doing similar work. The occupational wage data focuses on the wages paid for similar occupations (as

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<sup>7</sup> The SOC system classifies workers into occupational categories for data collection and dissemination purposes. SOC classifies workers at four levels: major group, minor group, broad occupation, and detailed occupation. See: [stats.bls.gov/soc/socguide.html](http://stats.bls.gov/soc/socguide.html) for more information.

<sup>8</sup> See the BLS website home page, [www.bls.gov/home](http://www.bls.gov/home), under “Wages by Area and Occupation”.

<sup>9</sup> Appendix B contains a complete listing of web addresses for occupational wage data by state.

distinct from similar *industries*) in a particular state or subdivision. The occupational classifications used are standard throughout the United States.

In any given occupational classification, even within a particular place of employment, there are likely to be significant differences among individual employees in terms of levels of experience, skill, and responsibility that would justify a difference in wages paid to individual employees. In some of the published State occupational wage databases, such differences are noted by the use of percentiles to denote the wages paid *within* an occupation. Some states also include entry-level wages and maximum wages. The BLS data, on the other hand, is limited to reporting mean and median pay figures.<sup>10</sup>

Both the occupation itself and the skill level of the worker are critical parts of the PIECP wage setting process. PIECP inmate workers, who often are hired as PIECP workers because of strong performances in traditional correctional industries, may already possess skill levels above the entry level. When CAC managers describes their PIECP work forces for wage setting purposes as “entry level, it can contribute to the DES’s misunderstanding and lead to the identification of wages that do not reflect the level of work actually being performed. The development of accurate job descriptions for each position is essential if PIECP CACs are to compete fairly in their localities.

In accordance with the 1999 PIECP Guideline, BJA defers to the specific wage or wage range approved by the State DES in all of these cases. But variations in the wage request responses received by Certificate Holders suggest that State wage-setting agencies often do not understand the PIECP wage requirement. It is critical that Certificate Holders communicate to the State agency the PIECP statutory requirement for wages at a rate “not less than that paid for work of a similar nature in the locality.”<sup>11</sup> (See pp. 55-57, *supra*, for two case studies involving the use of DES data.) It bears repeating that the wage setting process must be a documented, collaborative effort between the Certificate Holder and the DES if the wage determination is to be considered adequate.

## **PART II: POLICIES, PRACTICES, AND RECOMMENDED APPROACHES**

### **OVERVIEW**

The following pages address several areas of confusion identified by Certificate Holders, including:

- Determining the prevailing wage
- Determining a “training wage”
- Determining the split wage
- Self-determining the wage

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<sup>10</sup> Before beginning a search for a particular occupational wage, it is useful to familiarize yourself with the general occupational classification system. Occupations tend to be grouped under more general descriptions, such as “Management” or “Production”, and are then listed alphabetically within the appropriate sections.

<sup>11</sup> Sample letters to a State DES requesting wage information for a new CAC and for wage re-verification are included at Appendix C.

- Defining “locality”
- Tying wages to displacement
- Creating accurate job descriptions

For each of these topics, there is: (1) a statement of BJA’s statutory and administrative requirements; (2) an explanation of the policy rationale underlying the requirement; (3) a description of current practices of various Certificate Holders; and (4) a recommended approach that achieves compliance. Replication of the recommended approaches will not necessarily guarantee compliance given the unique characteristics of each CAC, but a similar approach, based on a similar rationale, should make compliance the likely outcome. Certificate Holders must meet all PIECP compliance requirements to maintain their PIECP Certificates.

## **DETERMINING THE PREVAILING WAGE**

**The requirement:** The PIECP Statute requires that inmate workers receive wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed. In addition, the 1999 Guideline has a number of provisions relating to prevailing wage determination that address wage verification, tying the wage to displacement, who must be paid the PIECP wage, how often the wage must be re-verified, and how low the wage can be set. (For a summary, see pp. 8-9, *supra*; the full text can be found at Appendix A.)

**Policy Rationale:** BJA wants PIECP administrators to ensure strong local input to avoid unfair competition with local businesses and workers. It asks the State wage-setting agency to determine the appropriate wage, or wage range, for all PIECP work. BJA only reviews a specific wage or wage range to determine whether or not it falls within the parameters set by the State wage-setting agency. The Statute does not give BJA the authority to approve deviations from the State agency's determination. In those cases where the State wage-setting agency cannot or will not provide necessary data, BJA has provided the "self-determination" option. (See Self-Determining the Prevailing Wage, pp. 23-27, *supra*, and the Sample case on p. 50 in Appendix D.)

**Current Practices:** The information currently available to PIECP Certificate Holders from State DES offices comes primarily from the Internet, through the OES system described on pages 14-18, *supra*. This means that Certificate Holders must often settle for data covering a broader geographical region than the specific locality (usually rural) where the CAC is located. In most cases, this data appears to be similar to the data available in the past, though the wage ranges may be higher or lower, given the change in geographic area from which the data may be derived.

Certificate Holders have reacted to the new OES system in a variety of ways. Most simply download the data, determine where their inmate workers fit in the range, and pay them accordingly. But there are a variety of situations that prove frustrating for Certificate Holders. State DES Websites may be poorly designed, making it difficult for a Certificate Holder to be sure it has located the right data. Or there may be multiple sets of data on the Internet with little or no guidance on what data is best for PIECP wage-setting purposes. The data is normally presented in percentiles and it may not be clear what percentile equates with BJA's prevailing wage requirement. Under the 1985 Guideline Certificate Holders would revert to the Federal minimum wage if they could not find appropriate wage data; now some Certificate Holders believe that the "self-determination" method allowable under the 1999 Guideline is best when they disagree with the OES data.

The latest round of assessments revealed that using the new OES system has been confusing for some Certificate Holders, causing them to decide to "self-determine" PIECP wages. Some Certificate Holders also reject the OES data because for them it resulted in a significantly higher wage. Sometimes OES wage data is rejected in favor of a "training wage" that results in paying the worker *less* than the low end of the OES wage scale for a period of time. None of these approaches meet the compliance requirement, and none were condoned during the last round of assessments. Certificate Holders do not have the authority to ignore or reject relevant, available data provided by their DES when they find it exceeds what they or their partners believe is a reasonable wage rate.

### **Recommended Approach:**

The key to setting wages is to be sure the wage paid is *at or above the low end of the range* provided by the State DES or downloaded from the Internet for similar work in the community. It bears repeating that the importance of an objective, arms-length relationship with the DES, to protect competing companies and free world labor, is critical to program success. The following steps should result in compliance with the prevailing wage requirement:

- Present the PIECP wage setting requirements to the State DES as part of a written wage-setting request. Clearly explain the purpose behind the request (to avoid undercutting local manufacturers and similarly skilled workers) to the wage-setting agency. Ideally, a copy of appropriate excerpts from the 1999 Guideline accompanies the initial requests for wage data. This should be the beginning of an on-going relationship with the DES.
- Describe the type(s) of work proposed with a level of detail that allows the wage-setting agency to make an informed decision. Providing accurate, detailed job descriptions that reflect the work performed occasionally may result in wage determinations higher or lower than would result from general descriptions. All workers performing “notable tasks” are included in the request. Clearly describing the occupations and skills involved is also necessary to address the displacement requirement that the CAC must avoid displacing workers with similar skills, crafts, or trades in the locality, not just those who produce the identical product the CAC will be making. PIECP workers are often (but not always) relatively unskilled, which may work to the CAC’s advantage in meeting the non-displacement requirement.
- Gather data for *all* job skill(s) to be included in the proposed CAC, for the geographic area that includes the locality when downloading information from the Internet.
- Set the starting wage at or above the low end of the range provided by the DES or found through the Internet. Ideally, a wage plan is developed that provides the opportunity for wage increases based on inmate worker productivity, longevity, and skill level.
- Make no “adjustments” to the wage range quoted or found, even if the private sector partner involved in the CAC pays less in its own community factory. Remember, the statutory requirement is key to setting wages—they must be set at a rate that is similar to the rate paid to others who do similar work in the locality. The fact that one company pays less than the others does not justify setting the CAC wage lower than the generally accepted rate in the community.
- Clearly document the entire process. Wage determination methodology should be clearly stated, issues and complexities identified, and decisions made and their rationales noted. Tracking who met with whom, when, and

the core content of business conducted and conclusions reached will underscore the objectivity of the process.<sup>12</sup>

## **SELF-DETERMINING THE PREVAILING WAGE**

**The Requirement:** The 1999 Guideline states:

If the prevailing wage cannot be obtained from the State department of economic security, or other similar department, the PIECP participant is responsible for establishing a reasonable prevailing wage. In such instances, the participant should retain on file, for BJA's review:

- relevant wage data from a sufficient number of competitors in the locality;
- data analyses for determining a reasonable prevailing wage result; and
- if possible, a written assessment of the reasonableness of the resulting prevailing wage determination by an appropriate state agency which normally determines wage rates.

The Certificate Holder should make every effort to establish an ongoing working relationship with the DES to determine prevailing wage rates as the standard approach for PIECP wage rate determinations.

**Policy Rationale:** Self-determination of the prevailing wage is a procedure designed to meet the needs of Certificate Holders who cannot access wage data from their state wage-setting agencies and to insure that Certificate Holders avoid the practice of reverting to Federal minimum wage when appropriate wage data is not readily available. BJA sees it as a practice of last resort, encouraging its Certificate Holders to use the data that is now or soon will be available over the Internet from State wage-setting agencies.

**Current Practices:** Several Certificate Holders have attempted to self-determine the prevailing wage, but few have succeeded. The 2000-2001 round of assessments revealed that some Certificate Holders had not understood the need to demonstrate the comparison basis for the wage they had self-determined, nor had their wage been approved by their State wage-setting agency. Rather, for a variety of reasons, they made an independent decision to set the wage at a given level and considered the issue resolved. None of these approaches meets the compliance requirement.

One state developed a new approach in 1999 when its State wage-setting agency stopped providing the wage data necessary for making wage decisions. The approach was shared with BJA and fellow Certificate Holders and has been accepted by BJA as a model that meets the 1999 Guideline requirement.<sup>13</sup> Other states have developed approaches which have yet to be tested.

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<sup>12</sup> Sample letters to a State DES requesting wage information for a new CAC and for wage re-verification are included in Appendix C.

<sup>13</sup> The CIA has sample forms available from that state which it will supply to interested Certificate Holders upon request.



**Recommended Approach:** As more jurisdictions gain expertise in using the State OES system, the need to self-determine PIECP wages should decrease.<sup>14</sup> When wages are self-determined, Certificate Holders must remember that these determinations must be objective. They must be based on factual, timely data from the locality, maintained on file, and should be reviewed by the State DES. Wage determination methodology should be clearly stated, issues and complexities should be identified. Decisions made and their rationales must be documented. Most important of all, the Certificate Holder must take into account the need to protect competing companies and free world labor, a primary obligation underlying the wage setting process. As is the case with DES-determined wages, the self-determined wage must be arrived at objectively and well documented if it is to be accepted as legitimate by parties affected by the CAC.

Certificate Holders who self-determine wages must also comply with the requirement to renew wage verifications annually, and to consider displacement in terms of the wage at each annual re-verification. This means that they must consider the actions of the private sector partner toward its own workforce in the community as well as whether conditions have changed over the course of the year such that the wage being paid to inmate workers is still unlikely to cause a layoff of similarly skilled community workers employed by similar businesses or with similar skills.

If a Certificate Holder must make a self-determination, the following process is suggested:

- The PIECP certificate holder should *define the locality* (the geographic area impacted by the presence of a PIECP CAC, which must be the same as the locality determination documented in the Notice of Designation).
- The Certificate Holder should be careful to *collect wage data for positions that are the most similar to the ones being rated*. Where possible, entry level, multiple percentiles, and maximum wages paid for the job function in question should be collected. The information will be valuable in performing the data analysis.
- Be certain that *only the actual hourly base wage is used*; do not include premiums and/or benefits such as shift differential, piece work, paid insurance, holiday or vacation add-ons.
- Relevant wage *data should be gathered from as many independent sources as practicable*. The following list is not intended to be all-inclusive, but rather as a starting point:
  - As many of the competitors of the CAC as necessary so a sufficient and accurate analysis can be done (Call competitors directly or survey and collect data from corresponding job postings in newspapers and want ads.)
  - The private sector partner itself

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<sup>14</sup> A survey of all PIECP Certificate Holders conducted for this paper showed that of the fifteen respondents, only one indicated its jurisdiction was unable to secure prevailing wage information from the State agency responsible for the determination of wage rates.

- Data supplied by local trade unions and/or business associations
- Published data from the State DES
- Published data from the US Department of Labor
- Once sufficient data is collected, *an analysis determines a reasonable prevailing wage or wage range* for each position. At no time can the prevailing wage be set below the Federal minimum wage, as defined in the Fair Labor Standards Act (FLSA).
- The Certificate Holder contacts the wage-setting agency and asks for written *confirmation of its “reasonableness.”*
- *Retain on file* all of the data collected, the analysis used, and the written confirmation from the DES as to the reasonableness of the resulting prevailing wage for BJA’s and others’ review.

## **DETERMINING A “TRAINING WAGE”: CAN IT BE DONE?**

**The Requirement:** The 1999 Guideline does not directly address the training wage issue, deferring to the State DES for all wage setting functions. The Federal minimum wage is the minimum PIECP wage under the Statute and it can be waived only in a small number of cases. The 1999 Guidelines does note that “any special wage program, excepted by law from the minimum wage requirement in the private sector, may be used by a PIECP CAC as long as the CAC meets the same program participation conditions as private sector participants.” (See 1999 Guideline, *supra*, “Definition of Minimum Wage.”) But the current Department of Labor Wage and Hour Division minimum wage materials show only a few exceptions for paying a lower than the Federal minimum: for vocational schools students, for disabled workers, and for employees between the ages of 18 and 20 (which might affect some younger inmates).<sup>15</sup>

**Policy Rationale:** BJA’s intention in including access to this very limited set of sub-minimum training wage opportunities was to provide its Certificate Holders with access to the same program available to companies competing with PIECP CACs. The much bigger issues related to training wages stem from the desire on the part of a number of Certificate Holders to pay the Federal minimum wage for a period of time while their PIECP workers are learning their jobs. The 1999 Guideline does not authorize the kind of on-the-job training that most Certificate Holders envision when they ask about training wages for their CACs. BJA recognizes that inmate workers typically need training before they can reach full production levels, and allows Certificate Holders to set wages at the low end of the range provided by the State wage-setting agency to accommodate this need. Some Certificate Holders have asked their wage-setting agencies for dispensation from the prevailing wage range (but not from the Federal minimum wage floor) for a limited period of time, and BJA has taken the position that it will support the decision of the wage-setting agency.

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<sup>15</sup> See: [www.elaws.dol.gov/flsa/](http://www.elaws.dol.gov/flsa/) for a discussion of what the FLSA requires.

**Current Practices:** Few Certificate Holders had a formal training wage in place as of the 2000-2001 round of PIECP assessments. A small number had made their own determinations as to training wages, independently declaring a wage and a time period that seemed reasonable to them by local standards. In those cases, Certificate Holders were informed that such practices were not acceptable under the 1999 PIECP Guideline. In some cases back wages were due to PIECP inmate workers.

**Recommended Approach:** Under the PIECP Statute, BJA does not have the authority to allow its Certificate Holders to independently create training wages for their CACs. Training needs obviously differ depending upon the nature of the work involved and the skills already present in the work force. BJA cannot set an arbitrary training period or wage which can be applied to all CACs.

The training wage question has no easy answers because of the “level playing field” goal of the program.<sup>16</sup> The Certificate Holder cannot go below the lowest end of the wage range quoted by the State wage-setting agency, except in those cases where the DES has approved a special training rate. The “training wage” is simply part of the larger wage continuum. PIECP wages cannot go below the Federal minimum wage except in the rare cases noted.

Rather than requesting a training wage, the Certificate Holder should consider the following alternative approaches to training which would avoid the need to designate the CAC until the workers were capable of earning the prevailing wage.

- Can the necessary training take place as part of the correctional institution’s vocational education program and remain outside actual production? If so, there would be no need to be concerned about a training wage since workers would come into the CAC ready to meet production expectations and could be paid within the prevailing wage range identified by the DES.
- Can the private sector partner or the correctional industries organization underwrite the training period? If so, the CAC workers should be paid at the entry level wage identified by the DES (usually the lowest percentile in the range) during the training period.
- Can the item produced by trainees stay within State boundaries, or be sold or donated to a non-profit organization or State agency? If so, the Certificate Holder need not be concerned with the training wage since workers will enter the CAC ready to meet production expectations and could be paid within the prevailing wage range identified by the DES.

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<sup>16</sup> See p. 54, *supra*, for a sample case involving training wages.

## **DETERMINING THE “SPLIT WAGE”**

**The Requirement:** BJA provided extensive guidance on the split wage<sup>17</sup> in its 2000 *PIECP Assessment Protocol and Sample Questionnaire* which has been widely circulated in the field.

As is the case with any CAC, the prevailing wage rate must be identified by the DES, or in cases where the DES is unable or unwilling to provide such information, through a self-determination process designed by the Certificate Holder, following BJA's April 17, 1999 Program Guideline, and approved by the State DES.

Written documentation of the market "split" must be supplied by the appropriate party (the private sector partner in the case of the employer model, and the prison industries organization in the case of the customer and manpower models)<sup>18</sup> and verified by the Certificate Holder as having been updated annually. This information, along with the analyses used to calculate the wage split, must be kept on file at a central location. It must be made available to BJA upon request or to its contractors performing PIECP assessments on-site.

If a product is produced which can be identified as destined for the interstate market, the Certificate Holder must identify those workers who produce the interstate products, and pay those specific workers the prevailing wage rate. It is not an acceptable practice for all workers in a shop to work on interstate products from time to time and then to pay an arbitrarily determined subset of those workers the prevailing rate.

When *fungible* items are produced for both the interstate and the intrastate markets (that is, items that are indistinguishable from each other), BJA understands that it is impossible to identify in advance those products destined for the interstate versus the in-state market. Under such circumstances it is acceptable to pay the prevailing wage rate to a subset of workers in direct proportion to the amount of interstate sales. However, those workers must be selected based upon explicit, written criteria of which the workers are aware prior to their employment in the CAC.<sup>19</sup> The criteria must be made available to BJA upon request or at the time of PIECP assessment visits made by BJA or its sub-contractors.<sup>20</sup>

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<sup>17</sup> “Split Wage” refers to inmate wage payments at one rate for products entering interstate commerce and at another (generally lower) rate for products that remain in-state.

<sup>18</sup> The Employer Model: A private company owns and operates a business inside a prison, and has direct control over business operations. Inmates are employed by the company. The Customer Model: A private company purchases most or all of the output of a business which is owned and operated by a correctional agency, but has no other role in the business. Inmates work for the correctional agency. The Manpower Model: A pre-determined fee covering labor, overhead, and profit is paid by the private sector to the prison industry. Inmates are employed by the correctional agency. BJA considers the Manpower Model a sub-set of the Customer Model.

<sup>19</sup> For example, those workers whose productivity is the highest, or who have worked in the shop the longest.

<sup>20</sup> NOTE: BJA understands that there are situations in which the amount of interstate product is small and is spread among a large number of workers for brief periods of the work day. In such cases, the Certificate Holder must make every effort to assign one or more individuals to the production of interstate product(s) and to pay those specific individuals the prevailing rate. This policy may result in the undesignation of PIECP CACs where there is insufficient interstate production to justify such an assignment.

In cases where work is seasonal and it is unclear at the time of production for which market the product is destined, then the Certificate Holder should refer to annual historical data on market percentages between the intra and interstate markets, and apply a formula which reflects that split during the off-season months.

Workers who may be working on interstate products only part of the time must have on file, at a central location, written verification that their involvement is voluntary. Compliance must be achieved by each CAC, individually.

**Policy Rationale:** BJA has determined that the split wage approach is acceptable in certain situations. For example, it might be acceptable where there was not enough business to justify production unless the product were sold to both the public and the private markets, or where a traditional correctional industry begins to sell some of its product to a private customer and hopes eventually to branch off in a separate line. The split wage procedure represents the understanding of the practice at the time it was written, but since then the variations have multiplied.

**Current Practices:** During the 2000-2001 round of assessments, assessors found a growing variety of approaches. In one state, PIECP inmates are being paid PIECP wages and working alongside non-PIECP inmates—doing exactly the same work—for traditional correctional industry wages. The proportion of inmates in each group exactly reflects the proportion of out-of-state to in-state markets for the product, but inmate workers are unhappy at the irrationality of the situation. In another jurisdiction, as described in Appendix D, wages are calculated by determining the total number of items produced in a given time period, then dividing the total items produced into two parts--those items going into the in-state market and those going into the interstate market. The percentage going into the interstate market is then multiplied by a standard formula to calculate the number of hours that inmate workers must be compensated at the prevailing wage.

Another jurisdiction produces a product for both the overseas market and the in-state market. The CAC identifies the product by cut number, style number, color, size, and case quantities. Packing lists and Bills of Lading are given to the business manager and verified by the production manager as to the actual dates of production. The cases shipped overseas for a given week are calculated as a percentage of all cases produced that week. The percentage is multiplied by 40 hours to determine the number of hours worked producing PIECP products by each inmate. These hours are entered as PIECP hours worked on the actual dates they occur. BJA accepted all of these approaches because they all technically meet compliance requirements.

**Recommended Approach:** The split wage procedure set out in this section remains in effect. The Certificate Holder must have a well-documented and “auditable” process which assessment teams or BJA can monitor. If output can be traced, for a given day for a given inmate, and the percentages for the split are provided, in writing, by the company (for employer model projects) or the correctional industry (for customer or manpower model projects), then the approach should meet compliance requirements.

## DEFINING LOCALITY

**The Requirement:** The 1999 Guideline states:

Locality means the geographic area impacted by the presence of a PIECP CAC operation. As used in the calculation of CAC wage rates, locality is a matter for definition by the appropriate State agency which normally determines wage rates (i.e., the State department of economic security).

As a practical matter, BJA assumes a contiguous, same-state geographic area.

**Policy Rationale:** Under the 1999 Guideline, BJA asks State DES agencies to define locality for the same reason it asked those agencies to set wages--State agencies have State interests in mind and are best situated to know the variables which must be taken into account.

Because of the way the PIECP Statute is structured, BJA has held PIECP Certificate Holders responsible only for PIECP employment practices within their own State borders. States may compete with other states for private sector partners; under the FLSA, the recruitment of private sector partners is legally prohibited only when a private sector company closes a union shop in one state so as to open a prison-based shop in another state. However, the Certificate Holder must exercise its judgment in determining what new operations represent sound investments of fiscal and political capital.

Locality is relevant to both displacement and wage determination under the PIECP. It must be considered for both purposes.

## Displacement Functions

For purposes of *displacement*, PIECP Certificate Holders are asked to provide a formal written assessment from their State DES that the proposed CAC will not displace currently employed or unemployed similarly skilled workers in the area impacted by the CAC. This is a kind of projected or anticipatory non-displacement finding based upon the State employment security agency's view of general employment levels for workers with occupations and skills similar to those in the proposed CAC (e.g., carpenters, sewers).

While procedurally BJA requires its Certificate Holders to make a formal displacement determination only once, in advance of CAC start-up, as a Statutory matter, Certificate Holders have a *continuing* obligation not to displace. BJA scrutinizes its CACs most carefully during the first year of operation, when their impact on the local business community is greatest. But CACs are also required to consider displacement as a part of the annual wage re-verification process (*supra*, pp. 13-14). This annual look at displacement focuses on changes in the local employment picture during the previous twelve months and asks the DES to consider the CACs effect on similarly skilled , employed workers in the community.

Certificate Holders are also asked to submit a written pledge from their private sector partners that they will not displace their own employees, a very *specific* non-displacement pledge. Though the 1999 PIECP Guideline asks only that the Certificate Holder's initial non-displacement assessment cover the locality where the CAC is to be located at the time of project inception, the displacement of a private sector partner's own employees *anywhere* in the state and for the life of the CAC should be avoided. For displacement purposes, the definition of locality used by the State DES will reflect industry and population patterns surrounding the CAC.

## **Wage Setting Functions**

For purposes of *wage-setting*, the DES will look at wages being paid to similarly skilled civilian employees in the full array of companies doing comparable work in the locality where the PIECP CAC is located, including but not limited to, the employees of the private sector partner ( if it has a community operation). The required comparison is between PIECP workers and similarly skilled civilian workers, not between the industry involved in the CAC and similar industries in the community. Given that it is the occupations and skill levels of the employees which should be compared, then the absence of a similar industry in the locality would not necessarily mean that no relevant wage data was available for comparison.

For wage-setting purposes, the size of the area defined as a locality likely will be a function of the data collection methodology used by the wage-setting agency for collecting occupational and wage data. The number of regions or areas into which a given state is divided for wage determination purposes varies from state to state. Typically, major metropolitan areas will be tracked separately, and there will be “balance of state” data which reflects the rural areas and excludes major cities.

**Current Practices:** Definitions of locality vary significantly among Certificate Holders and sometimes for the same Certificate Holder for the two separate purposes noted above—wage-setting and displacement determination. Most Certificate Holders accept the definition of locality provided by their State DES. Usually this means data which is organized by regions, which equate with localities. In some cases, a Certificate Holder will argue for a narrower definition of locality if conditions warrant an exception (e.g., if the prison or jail is extremely isolated). State offices of economic security in jurisdictions that respond to requests for very “local” data will analyze population and industrial patterns in the area impacted by the CAC. Such patterns may even cross state lines, as is the case in Kansas City, Kansas and Kansas City, Missouri.

### **Recommended Approach:**

BJA’s objective in requiring its PIECP CACs pay the prevailing wage and avoid displacement is to ensure that civilian businesses and workers are protected. The process by which this goal is achieved is to be determined by the State economic security agency. Certificate Holders should ask their DES to define locality as part of the wage-setting and non-displacement assessment processes; correctional industries organizations do not have this expertise or authority.

## **TYING WAGES TO DISPLACEMENT**

**The Requirement:** The 1999 Guideline states that, “when making PIECP prevailing wage verifications and annual re-verifications, the responsible State agency should recommend the utilization of a non-inmate wage scale which will not result in the displacement of non-inmate workers performing similar work in the relevant locality.”

**Policy Rationale:** BJA included this additional displacement reference in its 1999 Guideline to remind State DES agencies that they cannot provide meaningful wage determinations without considering the displacement impact of a PIECP CAC on similarly skilled civilian workers. Wages should be tied to displacement both at the initial wage determination and at all annual re-verifications.

As noted above, BJA requires a formal displacement projection and assessment only once, just prior to the start-up of any PIECP activity. The 1999 Guideline clearly

states that while compliance with the non- displacement requirement<sup>21</sup> is a continuing CAC obligation, “BJA will scrutinize CAC compliance with the non-displacement requirement just prior to and within one year after the initiation date of CAC operations.” But as a Statutory matter, the requirement not to displace similarly situated non-inmate workers is continuous. The explicit tying of wages to displacement is intended to accomplish this by urging State DES agencies to think about wages in terms of displacement impact each and every time they consider wages for a PIECP CAC.

**Current Practices:** All Certificate Holders submit non-displacement findings at the time of CAC designation, but not all Certificate Holders make annual re-verifications in the context of displacement. Many are unclear about how to implement the requirement.

**Recommended Approach:** For initial wage determinations, Certificate Holders should ask their wage-setting agencies to consider both the practices of the specific private sector partner with regard to its own workforce in the community as well as the impact of the CAC on the general pool of qualified employed and unemployed labor in the locality. The relevant comparison is between PIECP workers and both employed and unemployed similarly skilled civilian workers in the locality where the CAC is located.

For annual re-verifications, the DES should re-estimate the PIECP wage based on actual wage and employment changes in the locality. The wage being paid to PIECP inmate workers must not result in a layoff of community workers with similar skills. The relevant comparison is between PIECP workers and employed similarly skilled civilian workers in the locality where the CAC is located.

## **CREATING ACCURATE JOB DESCRIPTIONS**

PIECP Certificate Holders were surveyed about their use of job descriptions for this paper because in several of the recently completed assessments the assessors observed workers who were not performing the tasks included in their job descriptions. Instead, they were performing tasks that required additional skills or education. The survey asked: “Are there written job descriptions for the actual job functions that are being performed?” Of the fifteen respondents, seven answered “yes,” three indicated “no,” one replied “kind of,” and four did not respond to the question.

### **Why is an accurate job description necessary?**

- ❑ To request and receive an appropriate wage rate from the State wage-setting agency or when self-determining the wage
- ❑ To ensure that all “notable tasks” are taken into consideration for determination of the prevailing wage
- ❑ To ensure the employee knows what his/her responsibilities and authority are
- ❑ To ensure the employee knows what new skills or education are needed to progress in the organization

**What is a job description?** A basic job description contains several different factors, including:

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<sup>21</sup> That CAC operations must not result in the displacement of employed workers; be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or significantly impair existing contracts.



- Purpose (Primary accomplishments, products, and services; who benefits from them and how)
- Essential Duties (What does the individual have to be able to do to achieve the desired results on the job)?
- General Description (How would you describe this job to someone who has never done it?)
- Minimum Requirements (How much formal education and experience/job knowledge is required to be proficient in handling the job responsibilities?)

**Sources for job descriptions that are used by several state agencies responsible for determining wage rates:**

- SOC, Standard Occupational Classification, US Department of Labor, Bureau of Labor Statistics. This system will be used by all Federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. All workers are classified into one of over 820 occupations according to their occupational definition. To facilitate classification, occupations are combined to form 23 major groups, 96 minor groups, and 449 broad occupations. Each broad occupation includes detailed occupation(s) requiring similar job duties, skills, education, or experience.
- DOT, US Department of Labor, Employment & Training Administration
- O\*NET (Occupational Information Network), US Department of Labor, Employment & Training Administration. O\*NET is replacing the Dictionary of Occupational Titles (DOT). It currently contains information developed by using the O\*NET skill-based structure. Future data will come directly from workers and employers themselves, describing the work they do, the skills they need, and the knowledge they use on the job.

**APPENDIX A**  
**THE 1999 GUIDELINE WAGE REQUIREMENTS**  
**Federal Register. Vol. 64. No 66. Wednesday, April 7, 1999**

PIECP inmate workers must receive wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed. This requirement benefits society by allowing for the development of prison industries while protecting the private sector labor force and business from unfair competition that could otherwise stem from the flow of low-cost, prisoner-made goods into the marketplace. PIECP participants must, therefore, implement the prevailing wage requirements under like conditions experienced by private sector competition. Toward this end, the following requirements are applicable:

(A) Section 1761(c) requires that the PIECP wage amount be set exclusively in relation to the amount of pay received by similarly situated non-inmate workers. In deriving the appropriate PIECP wage, 18 U.S.C. 1761(c)(2) does not allow other cost variables to be taken into consideration, such as unique expenses incurred as a result of undertaking production within the prison environment.

(B) Prevailing wage verification must be obtained by the appropriate state agency which determines wage rates (usually the Department of Economic Security).

(C) When making PIECP prevailing wage verifications and annual re- verifications, the responsible state agency should recommend the utilization of a non-inmate wage scale which will not result in the displacement of non-inmate workers performing similar work in the relevant locality.

(D) The PIECP prevailing wage must be received by those inmate workers performing notable tasks necessary to produce and/or transport goods in interstate commerce. If a similarly situated, private sector company is paying wages to obtain services that are necessary to production, e.g. refuse pickup, then the PIECP CAC must also pay such wages to the inmate provider of like services. In determining which tasks are covered, the following considerations are relevant: the amount of inmate time involved, effort and skill necessary to accomplish the task, the regularity of task performance, and whether the task would have been performed by the inmate absent PIECP production.

(E) The prevailing wage must be verified prior to the initiation of PIECP participation. Annually, thereafter, the PIECP participant must re-verify the adopted wage to ensure that it continues to be comparable to wages paid for work of a similar nature in the locality in which the project is located.

(F) If no such verification can be obtained from the State Department of Economic Security, or other similar department, the PIECP participant is responsible for establishing a reasonable prevailing wage. In such instances, the participant should retain on file, for BJA's review: (1) relevant wage data from a sufficient number of competitors in the locality; (2) data analyses for determining a reasonable prevailing wage result; and (3) if possible, a written assessment of the reasonableness of the resulting prevailing wage determination by an appropriate state agency which normally determines wage rates.

(G) The PIECP prevailing wage can not be set below the Federal minimum wage, as defined in the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq. Payment of the Federal minimum wage, however, does not automatically achieve compliance with the prevailing wage requirement unless the prevailing wage for the comparable private sector industries is, in fact, the Federal minimum wage.

(H) Overtime, at one and a half times the rate of regular or prevailing wage, must be paid for prisoner hours worked in excess of 40 hours per week. See 29 U.S.C. 207(a) (a payment standard imposed on private sector competition).

(I) If a CAC pays a wage based on piece work, the project must apply a calculation to convert regular wages paid into a comparable hourly wage. The calculation should be used as a routine check to ensure that inmate workers, paid according to piece rate work, do not receive less than the Federal minimum wage. In instances where the CAC is paying Federal minimum wage and such a wage is less than the industry standard for the prevailing wage, the CAC must be able to identify inmate worker performance variances as justification for the wage rate.

(J) BJA strongly encourages the use of wage plans that take into consideration a PIECP worker's experience, seniority, and performance.

#### Definitions:

**Locality:** Locality means the geographic area impacted by the presence of a PIECP CAC operation. For PIECP CACs, it is relevant with regard to: determining inmate wages, providing consultation to appropriate labor and private sector organizations, and determining whether a PIECP CAC operation will displace the private sector labor force. All locality determinations must be documented as part of a Notice of Designation. As used in the calculation of CAC wage rates, locality is usually a matter for definition by the appropriate state agency which normally determines wages rates (i.e., the State Department of Economic Security).

**Minimum Wage:** Minimum wage refers to the Federal minimum wage which is the lowest possible wage that can be paid to private sector employees under the Fair Labor Standards Act, 29 U.S.C. 206. Any special wage program, excepted by law from the minimum wage requirement in the private sector, may be used by a PIECP CAC as long as the CAC meets the same program participation conditions as private sector participants. The requisite payment of at least a minimum wage, by a CAC, is in no way intended by BJA to imply that PIECP inmate workers are employees for purposes of the PIECP statute or any other Federal law.

**Prevailing Wage:** Prevailing wage is a wage rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed, 18 U.S.C. 1761(c)(2).

## APPENDIX B

# WEB SITE ADDRESSES FOR STATE OCCUPATIONAL WAGE DATA

Alabama:	<a href="http://209.192.62.235/oes/wage/wage.htm">http://209.192.62.235/oes/wage/wage.htm</a>
Alaska:	<a href="http://www.labor.state.ak.us/research/wage/oes%5Ftech.htm">http://www.labor.state.ak.us/research/wage/oes%5Ftech.htm</a>
Arizona:	<a href="http://az.gov/cgibin/inqsrch?free_text+occupational+wage+data&amp;x=14&amp;y=7">http://az.gov/cgibin/inqsrch?free_text+occupational+wage+data&amp;x=14&amp;y=7</a>
Arkansas:	<a href="http://www.state.ar.us/esd/lmiwage00state.htm">http://www.state.ar.us/esd/lmiwage00state.htm</a> <a href="http://www.state.ar.us/esd/lmiwage2000msa.htm">http://www.state.ar.us/esd/lmiwage2000msa.htm</a>
California:	<a href="http://www.calmis.ca.gov/file/occup\$/oes\$.htm">http://www.calmis.ca.gov/file/occup\$/oes\$.htm</a>
Colorado:	<a href="http://www.coworkforce.com/LMI/oes/data.htm">http://www.coworkforce.com/LMI/oes/data.htm</a>
Connecticut:	<a href="http://www.ctdol.state.ct.us/lmi/internet/toc000.htm">http://www.ctdol.state.ct.us/lmi/internet/toc000.htm</a>
Delaware:	<a href="http://www.oolmi.net/pub/2000wage.pdf">http://www.oolmi.net/pub/2000wage.pdf</a>
D.C.:	<a href="http://www.bls.gov/oes/2000/oes_dc.htm">http://www.bls.gov/oes/2000/oes_dc.htm</a>
Florida:	<a href="http://www.2myflorida.com/awi/lms/ows/wages-2001edition.pdf">http://www.2myflorida.com/awi/lms/ows/wages-2001edition.pdf</a>
Georgia:	<a href="http://www.g1careernet.com/demand/demand.htm">http://www.g1careernet.com/demand/demand.htm</a>
Hawaii:	<a href="http://bls.gov">http://bls.gov</a>
Idaho:	<a href="http://www.labor.state.id.us/lmi/wage-survey/ows+blesmenu.htm">http://www.labor.state.id.us/lmi/wage-survey/ows+blesmenu.htm</a>
Illinois:	<a href="http://lmi.ides.state.il.us/wagedata/wage.htm">http://lmi.ides.state.il.us/wagedata/wage.htm</a>
Indiana:	<a href="http://www.in.gov/dwd/inews/lmi1.asp?md=1&amp;tp=04">http://www.in.gov/dwd/inews/lmi1.asp?md=1&amp;tp=04</a>
Iowa:	<a href="http://www.iowaworkforce.org/ris/lmi/wages2000/">http://www.iowaworkforce.org/ris/lmi/wages2000/</a>
Kansas:	<a href="http://laborstats.hr.state.ks.us/occupatn/ws2001/ws2001.htm">http://laborstats.hr.state.ks.us/occupatn/ws2001/ws2001.htm</a>
Kentucky:	<a href="http://www.bls.gov">http://www.bls.gov</a>
Louisiana:	<a href="http://www.ldol.state.la.us/wagedata.asp">http://www.ldol.state.la.us/wagedata.asp</a>
Maine:	<a href="http://www.bls.gov">http://www.bls.gov</a>
Maryland:	<a href="http://www.dllr.state.md.us/lmi/wages/toc000.htm">http://www.dllr.state.md.us/lmi/wages/toc000.htm</a>
Massachusetts:	<a href="http://www.detma.org/MassStats/webSARAS/frame_it.asp?TheProductName=MassStats">http://www.detma.org/MassStats/webSARAS/frame_it.asp?TheProductName=MassStats</a>
Michigan:	<a href="http://www.michlmi.org/web_nav/Wages/frame.htm">http://www.michlmi.org/web_nav/Wages/frame.htm</a>
Minnesota:	<a href="http://www.mnworkforcecenter.org/lmi/download/dwage.htm">http://www.mnworkforcecenter.org/lmi/download/dwage.htm</a>
Mississippi:	<a href="http://www.mesc.ms.us/lmi/oes/index.html">http://www.mesc.ms.us/lmi/oes/index.html</a>

Missouri: <http://www.works.state.mo.us/lmi/oes/index.htm>

Montana: <http://rad.dli.state.mt.us/wage/1999wage/default.asp>

Nebraska: [http://www.dol.state.ne.us/nstars/frame\\_it.asp?theProductName=NSTARS](http://www.dol.state.ne.us/nstars/frame_it.asp?theProductName=NSTARS)

Nevada: [http://detr.state.nv.us/lmi/lmi\\_wage\\_oes.htm](http://detr.state.nv.us/lmi/lmi_wage_oes.htm)

New Hampshire: <http://www.nhes.state.nh.us/elmi/textonly/salsurvey.htm>

New Jersey: <http://www.wnjp.in.net/OneStopCareerCenter/LaborMarketInformation/lmilst.htm>  
(Click "OES Wage Survey")

New Mexico: <http://www.dol.state.nm.us/wage2001.PDF>

New York: [http://www.labor.state.ny.us/labor\\_market/LMI\\_business/oeswage/search.htm](http://www.labor.state.ny.us/labor_market/LMI_business/oeswage/search.htm)

North Carolina: <http://www.bls.gov>

North Dakota: <http://www.state.nd.us/jsnd/bin/lmidata.pl/wage>

Ohio: <http://lmi.state.oh.us/OES/ANNUAL/wage1998.pdf>

Oklahoma: <http://www.oesc.state.ok.us/lmi/OkOccWage/default.htm>

Oregon: <http://olmis.emp.state.or.us/olmisj/PubReader?sitemid=00000053>

Pennsylvania: <http://www.lmi.state.pa.us/palmids/Saintromain.asp?Currsession=OCCWAGE>

Rhode Island: <http://www.det.state.ri.us/webdev/lmi/oeshome.html>

South Carolina: <http://www.bls.gov>

South Dakota: <http://www.state.sd.us/dol/lmic/occupationalwages.htm>

Tennessee: <http://www.state.tn.us/labor-wfd/wages/areas.htm>

Texas: <http://www.twc.state.tx.us/lmi/lfs/type/wages/wageshome.html>

Utah: <http://wi.dws.state.ut.us/pubs/uow/wagepub2001.asp>

Vermont: <http://www.det.state.vt.us/line/>

Virginia: <http://www.bls.gov>

Washington: <http://www.wa.gov/esd/lmea/occddata/oeswage/TOC000.htm>

West Virginia: <http://www.bls.gov>

Wisconsin: [http://www.dwd.state.wi.us/lmi/wages\\_oesmsa.htm](http://www.dwd.state.wi.us/lmi/wages_oesmsa.htm)  
[http://www.dwd.state.wi.us/lmi/wages\\_oesstate\\_tables.htm](http://www.dwd.state.wi.us/lmi/wages_oesstate_tables.htm)

Wyoming: <http://www.state.wy.us/99oespub/toc.htm>

## APPENDIX C

### SAMPLE LETTERS TO STATE DES AGENCY

#### 1. INITIAL WAGE/ NON-DISPLACEMENT REQUEST

**This letter introduces the Certificate Holder to the DES and helps to document the relationship.**

This letter serves as an introduction to the Prison Industries Enhancement Certification Program (PIECP). The (name of Certificate Holder) is in the process of designating (name of private sector company) as a Cost Accounting Center (CAC) under the PIECP. The PIECP provides exemption from certain Federal constraints on the manufacturing and distribution on inmate-made goods in interstate commerce. A primary tenet of the PIECP is that competing companies and free world labor in the locality where the CAC is located will be protected through a fair wage-setting process. Under the PIECP Statute, PIECP inmate workers must be paid at a rate that is “not less than that paid for work of a similar nature in the locality where the work is performed.” (18 USC 1761(c))

(Name of CAC) wishes to begin operating at the (name and location of correctional facility) on or about (date). The CAC may not begin operations until it receives a written wage determination from your agency for each of the jobs to be created, along with a non-displacement assurance. The (name of CAC) will employ (number of workers and their Standard Occupation Classification (SOC) and/or the specific job descriptions) while producing (product being manufactured).

We are asking that you determine the prevailing wage or wage range for each of the job descriptions listed that will not result in displacement of non-inmate workers in the locality. In addition, for each of the job descriptions, we are requesting your separate determination whether the employment of inmates in the (CAC name) will likely result in the displacement of currently employed and unemployed non-inmate workers performing the same work in the locality.

I have attached a copy of the 1999 PIECP Guideline which describes the role of the State wage setting agency in making wage determinations under the PIECP.

Please feel free to contact me at (telephone or e-mail) to discuss any issues of concern.

## **2. ANNUAL RE-VERIFICATION of WAGE REQUEST**

**This letter re-introduces the Certificate Holder and helps to document the relationship.**

The (name of Certificate Holder) is required to secure an annual re-verification of the wage(s) paid to the inmate workers for the (name of CAC) under provisions of the Federal Prison Industry Enhancement Certification Program (PIECP).

(Name of CAC) has been operating at the (name and location of correctional facility) since (date). The (name of CAC) employs (number of workers and their specific job descriptions) in the production of (product being manufactured).

Currently the inmate workers are being paid the following wage, as determined by your correspondence dated (insert date of original or most current wage determination). (List the Standard Occupation Classification (SOC) and/or current job description with the corresponding wage/wage range.)

When determining wages for this year, please consider whether conditions have changed over the course of the previous year such that the wage being paid to PIECP inmate workers is likely to result in a layoff of workers in similar businesses or with similar skills in the defined locality.

Please feel free to contact me at (telephone or e-mail) to discuss any issues of concern.

## APPENDIX D

### FIVE CASE STUDIES

The following vignettes of wage policies in action offer a more detailed picture of how PIECP Certificate Holders are operating their CACs—how they think about the wage question, and the steps they take to try to comply with the PIECP wage requirements. Each vignette focuses on a separate aspect of wage policy.

#### 1. Self-Determining Wages

In jurisdiction A the assessment team found that wages appeared to have been self-determined, but had not been approved by BJA. The team was told there was no wage data available from the economic security agency for the locality in which the CAC was located, and therefore the Certificate Holder had “self-determined” the wage range which it would pay its inmate workers. The Certificate Holder was unable to provide documentation on how it arrived at the wage range, except to say that it believed the rate to be reasonable. The jurisdiction had read the 1985 Guideline to mean that if no wage data were available, then the Federal minimum wage was acceptable. When the 2000 assessment team pointed out the new requirement in the 1999 Guideline and asked for verification supporting the wage range then in use, it became clear that no annual update had been done for some time (the CAC had been designated a decade before).

As a result of the assessment, the jurisdiction agreed to develop and submit to BJA a full self-assessment that would result in a wage reflecting community practice for similar work. Self-assessment paperwork was forwarded to jurisdiction A, but after a few weeks the Certificate Holder instead provided BJA with its original wage range and a letter explaining that there was no real economic activity in the locality that could be used to develop comparable data. The State department of economic security had wage data that was much higher than the wage being paid to the PIECP inmates, but that data was state-wide and not locality based.

BJA reiterated the need to provide an appropriate rationale for the wage rate and suggesting several options, including getting the State department of economic security to sign-off on the plan as it existed. Shortly thereafter, the Certificate Holder provided BJA with a letter from the department of economic security which did accept the wage range identified by the Certificate Holder, which resolved the matter for BJA.

#### 2. Determining Wages for a Group Using Imputed Hours Rather than Actual Hours Worked

Jurisdiction B uses a group pay plan, something assessors had not previously encountered. Under this group pay plan, the total wages earned by all the inmates in the shop for a given amount of production were to be divided among the individual workers. Since the CAC in question is also a “split wage shop,” in which the product is produced for both the state and the private sector markets, there was a need to determine what percentage of the product would be paid at PIECP wages, and what percentage at “traditional” correctional industries wages. The assessment team members were concerned that they could not determine if inmates were receiving prevailing wages during the actual time they were working on PIECP products because those hours were not recorded separately from hours worked on non-PIECP products.

Upon further inquiry, BJA learned that for this CAC, a labor standard is used to determine how long it *should* take a worker to produce one unit of the product in



question, and inmates are paid for that number of hours per unit, rather than the actual number of hours they work per unit. The CAC had turned to this method when it discovered that inmate workers were manipulating the amount of time spent producing the units depending upon whether PIECP wages or traditional wages were to be paid.

The Certificate Holder secured the formula from an impartial. The Certificate Holder defended the need to combine the PIECP production and the in-state production because the quick order turn-around prevented separate manufacturing runs.

The Certificate Holder does not, and cannot, track the hours spent on the PIECP units as distinct from all units, but rather tracks and pays based on the total PIECP units *shipped*. One time clock is used to determine the total number of hours an inmate works each day. At the end of the day, the computer totals the number of PIECP and traditional units shipped that day. Total inmate hours are also calculated for each inmate as well as for the group of inmates working in the CAC. As hours spent on PIECP and traditional work are not differentiated, the number of hours spent exclusively on the PIECP units cannot be determined. Rather, the inmates' rate of pay is calculated based on the standard labor rate as follows: Multiply the number of PIECP units shipped by the established labor standard (how long it should take to produce them). The resulting number is the number of "calculated standard labor hours" the PIECP inmate workers group spent producing all PIECP units. This number is then multiplied by the highest PIECP inmate hourly wage, to determine total PIECP wages. The total is then distributed proportionately to individual workers based on the hours each has worked during the pay period.

The assessment team felt that this approach was not the same as paying a PIECP wage to individuals based on time spent producing PIECP products because actual hours worked were not used. The Certificate Holder assured BJA that they were recording the output of the group for each day, as well as the markets to which the units were actually shipped, so that it would be "auditable" by BJA or anyone else.

BJA ultimately agreed with the Certificate Holder that this was an acceptable approach, noting that the important point was that the private sector company was paying the appropriate wages to the Certificate Holder. How the Certificate Holder compensated its inmates was an issue on which BJA was willing to be flexible as long as the approach being used was fair, typical of the industry, and capable of being evaluated by independent auditors.

### **3. Differentiating Between Training and Production**

The assessment team found that a CAC in jurisdiction C had a wage problem in its very popular and innovative private sector partnership. The CAC was primarily a vocational training project, but had a distinct production component. By design, Inmates moved back and forth between training and work, building their skills sequentially. As this process reached its logical conclusion, the inmate workers involved in manufacturing were still labeled "trainees" and therefore not paid the prevailing wage (though they were being paid above the Federal minimum wage level). The IRS had issued a specific ruling to the CAC which seemed to clearly state that *employees* had to be paid the prevailing wage, while *trainees* need not be compensated at that level. However, the Certificate Holder had not considered whether any of the inmates involved in the training program had moved beyond the trainee classification. The assessment team disagreed.

As a result of the PIECP assessment, the Certificate Holder agreed with the assessment team that the most advanced stage of the training program was really a

production operation and that those workers should no longer be classified as trainees. They agreed to renegotiate with the employer to raise the wage appropriately. They procured a wage letter from their State department of economic security which provided an appropriate wage range, and agreed to raise wages for these workers to a point at or above the low end of that range as quickly as possible.

#### **4. Struggling to Interpret Department of Economic Security Data: Is There Data Beneath the Data?**

Jurisdiction D was informed in 1998 by its department of economic security that from that time forward only the *mean* wage for any given job could be provided in response to wage requests for PIECP CACs due to the changeover to the new OES system. The Certificate Holder was told to make its own wage determinations based upon that figure. Repeated attempts to get more specific information were unsuccessful. The Certificate Holder felt strongly that the mean wage was too high, given the inexperience and lack of skills typical of its workforce.

In the summer of 2000, when the Certificate Holder requested wage range updates for all of its CACs it received wage *ranges* from its economic security agency. Low, mean, and high wages for each job category were made available. In each case, the "low" wage was above the Federal minimum wage. However, when the Certificate Holder requested further clarification as to how the ranges were derived, it was explained (by telephone) that each of those numbers itself represented a range and that the bottom of the "low" range in each case was the Federal minimum wage.

Based upon this information, the Certificate Holder determined that the Federal minimum wage (and not the previously supplied mean wage) was acceptable in each of the several CACs it operates. The Certificate Holder made a "note to the file" to this effect. This note, along with the new wage ranges, was the only information provided to the assessor as the basis for the wage determination.

The assessment team felt strongly that the prevailing wage was not being paid to the jurisdiction's PIECP workers. After lengthy discussion and analysis, BJA agreed with the assessment team, stating its belief that the State wage-setting agency was not suggesting that the Federal minimum wage was the entry level wage for the job categories in the request, but rather that the Federal Minimum wage is simply the lowest possible wage that theoretically can be paid for *any* work performed in the jurisdiction, and that for that reason it was included as an anchor for the data underlying the "low" range. Therefore, the Certificate Holder was asked by BJA to use the low-median-high wage scale as provided by the economic security agency. It could, if it wished, set its wages anywhere at or above the "low" end of that scale. In jurisdiction D that meant the 25th percentile level since that was the percentile identified by the State agency as "low."

The Certificate Holder also reached an agreement with its department of economic security that from this point forward it would supply the information necessary to set wages within the prevailing range for each occupation. The Certificate Holder also agreed to make any necessary wage adjustments in existing CACs as the annual updates for wages take effect. Wage updates will be requested so that any changes in wage can be implemented on or before the anniversary date of the CAC's designation.

## **5. Struggling to Interpret Department of Economic Security Wage Data: Is a Staged Approach Acceptable?**

The State department of economic security in jurisdiction E was responsive to the Certificate Holder's request for updated wage range information for several of its CACs. But the assessor found inmate workers in one CAC were being paid less than the rate reported by the department of economic security. The assessor, in consultation with BJA, suggested that the Certificate Holder either raise the wages so they would be within the range provided, or request a review of the wage range in the locality by the wage-setting agency. The Certificate Holder agreed, and noted it had developed a plan to remedy the situation. Upon further examination, however, it became clear that the new plan was not acceptable because the wage-setting agency had identified a per hour figure well above the Federal minimum wage as the "low" end of the range, yet the Certificate Holder was proposing to hire inmates at the Federal minimum wage, and then to increase the pay gradually to reach that figure within a year. The Certificate Holder further proposed that new hires with previous experience or training would now be hired at a pay level appropriate to that experience or training.

BJA responded that it had no authority to condone wage plans outside the range provided by the State wage-setting agency. Rather, BJA asked the Certificate Holder to take one of three suggested courses of action: (1) get the department of economic security to sign-off on the wage plan as submitted; or (2) work with the department of economic security to reassess the work being done, ask for a new definition of the functions the CAC inmates and an appropriate wage range for those functions, and then start paying them at or above the low end of the new range; or (3) start paying the new wage immediately.

The Certificate Holder wished to request a new wage range from its wage-setting agency, including periodic increases, until the 10th percentile was achieved at the conclusion of a training period. The possibility of back wages being owed was acknowledged.

No Certificate Holder to date has received the approval of its State wage-setting agency for a training wage outside the OES range. However, BJA did make technical assistance available through the CIA, helping the Certificate Holder to draft accurate job descriptions as well as proposed language covering the skills needed and the time necessary to learn the skills in question.

In the end, the State wage-setting agency agreed to a new wage plan that equated with the 10th percentile wage for each of the occupations involved. The wage-setting agency agreed with the Certificate Holder that the wage scale was reasonable, given the limited skills and minimal experience of most inmate workers. The proposed plan allows for wages to exceed the 10th percentile if an inmate were to develop the necessary occupational skills. The wage-setting agency further recommended that the wage scale be reviewed annually, in keeping with BJA's 1999 Guideline requirement.