

§510.23

their industry. If a three-digit code is not listed, employers shall use the applicable two-digit code.

[55 FR 12120, Mar. 30, 1990; 55 FR 12778, Apr. 5, 1990]

§510.23 Agricultural activities eligible for minimum wage phase-in.

Agriculture activities eligible for an extended phase-in of the minimum wage in Major groups 01, 02, and 07 have been incorporated into Appendix B—Nonmanufacturing Industries Eligible for Minimum Wage Phase-In. Applicable wage rates are effective retroactive to April 1, 1990. Employers in the sugarcane farming industry (SIC Number 0133) who are subject to Tier 3 wage rates but who have paid wage rates based on Tier 2 wage rates may not take any action to recoup such payments where those actions would have the effect of reducing the wage rate being paid at the time of such recoupment to below that required under Tier 3.

[55 FR 53247, Dec. 27, 1990]

§510.24 Governmental entities eligible for minimum wage phase-in.

(a) The Commonwealth government of Puerto Rico has been determined to be eligible for treatment under Tier 2, on the basis of wage data supplied to the Department.

(b) Appendix C of this part contains a listing of Commonwealth government corporations, indicating the phase-in tier which applies. Entities which do not appear on the list are those for which no wage data were supplied. These entities are therefore categorized under Tier 1, and are ineligible for an extended phase-in.

(c) Appendix D of the part contains a listing of municipalities, indicating the phase-in tier which applies. Municipalities categorized under Tier 1 are those which failed to supply wage data.

(d) Employees of municipalities who have reason to believe that the municipality by which they are employed has been incorrectly categorized, e.g., categorized under Tier 3 instead of Tier 2, may no later than June 1, 1990, file with the Administrator a petition for review. The petition shall be accompanied by any information the em-

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ployee may have to support a determination that the municipality is incorrectly categorized. In the event the Administrator determines that a tier other than that listed in appendix D of this part applies, the affected municipality shall be liable for retroactive payment of any back wages found to be due.

(e) Certain employees of municipalities or government corporations in which the average wage is less than \$4.00 per hour are eligible to be paid under Tier 4, rather than Tier 3. Tier 4 applies only to those employees employed by municipalities or government corporations who are principally engaged in one or more of the “traditional” functions listed in §510.24 (a) or (b). All other employees of such entities must be paid in accordance with Tier 3.

[55 FR 12120, Mar. 30, 1990; 55 FR 12778, Apr. 5, 1990]

§510.25 Traditional functions of government.

(a) Section 6(c)(4) of the Act, as amended, limits the six-year phase-in of the statutory minimum wage (“Tier 4”) to those employees with an average wage of less than \$4.00 per hour who were brought under minimum wage coverage “pursuant to an amendment made by the Fair Labor Standards Amendments of 1985.” The Department has interpreted this language as referring to section 2(c) of the 1985 FLSA Amendments, which provided for deferred liability for minimum wage violations (until April 15, 1986) “with respect to any employee who would not have been covered under the Secretary’s special enforcement policy” published in 29 CFR 775.2 and 775.4. The latter subsection listed those functions of State or local government which were determined by the Supreme Court’s ruling in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (subsequently overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)) to be integral operations of the governments in areas of traditional governmental functions. The listed “traditional” functions included the following:

- (1) Schools.
- (2) Hospitals.

- (3) Fire prevention.
- (4) Police protection.
- (5) Sanitation.
- (6) Public health.
- (7) Parks and recreation.
- (8) Libraries.
- (9) Museums.

(b) The Supreme Court in *National League of Cities* clearly did not limit “traditional” functions of government to those set out in paragraph (a) of this section. The Court included within this concept all those governmental services which the States and their political subdivisions have traditionally afforded their citizens, which the States have regarded as integral parts of their governmental activities, and which State and local governments are created to provide. The Department interprets the Court’s analysis of “traditional” functions as turning in large part upon whether the States or local governments had, prior to initial enactment of federal regulatory legislation applicable to a particular field of service or activity (such as FLSA), generally established themselves as providers of the services. The Department therefore views the following government functions as falling within the “traditional” category:

- (1) Finance (including Auditor, Budget and Comptroller).
- (2) Elections.
- (3) Personnel.
- (4) Public works.
- (5) Office of the Mayor.
- (6) Legal Affairs.
- (7) Planning.
- (8) Waterworks.
- (9) Social services.
- (10) Street and highway construction and maintenance.
- (11) Automobile licensing.
- (12) Sewage treatment.

(c) Employees whose primary function falls within one or more of the activities listed in paragraph (a) or (b) of this section, are therefore considered to be engaged in “traditional” functions of government. This would include employees who provide support functions for such activities, such as clerical, secretarial, supply and janitorial.

(d) No employees of a municipality or government corporation may be paid in

accordance with the Tier 4 phase-in schedule unless the employee:

(1) Is engaged in one of the specific activities listed in paragraphs (a) and (b) of this section, and

(2) Is employed by a municipality or government corporation in which the average wage is less than \$4.00 per hour.

APPENDIX A TO PART 510—MANUFACTURING INDUSTRIES ELIGIBLE FOR MINIMUM WAGE PHASE-IN

This appendix contains a listing of all manufacturing industries for which data were collected and compiled by the Commonwealth of Puerto Rico for purposes of implementing the 1989 Amendments to FLSA. This listing follows the order and classifications used in the *SIC Manual, 1987*, which is incorporated by reference in these regulations (§510.21).

The data in this appendix are presented by major industry group (two-digit classification), industry group number (three-digit classification), and industry number (four-digit classification). Tiers will not be listed for industry categories in which there were fewer than three employers, in conformance with standard procedures used by the Commonwealth of Puerto Rico in collecting and publishing these data until such time as Puerto Rico receives appropriate waivers of confidentiality from all employers in such categories. These categories are noted with an “a” on the following table. In addition, no tier will be listed where an industry was not included in the original survey, because it was not in existence, because the industry was too small to be included, or for other reasons.

Employers who do not find the four-digit classification for their industry shall refer to the appropriate three-digit classification under which their establishment falls. If the appropriate three-digit classification is not listed, employers shall refer to the appropriate two-digit classification. For example, no tier is listed for industry number 2034, dried and dehydrated fruits, vegetables, and soup mixes. Thus, an employer in industry 2034 must use the tier listed for industry group 203, i.e. Tier 2.

Further, employers who find the appropriate four-digit designation in this appendix *must* use that designation and cannot refer to a two- or three-digit classification. For example, an employer in industry number 2033, canned fruits, vegetables, preserves, jams, and jellies, which has a Tier 1 designation, cannot use the Tier 2 designation of industry group 203, canned, frozen, and preserved fruits, vegetables, and food specialties.