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## **SUMMARY FINDINGS OF THE 2009-2010 PIECP COMPLIANCE SITE ASSESSMENTS**

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## **BACKGROUND**

BJA's Prison Industry Enhancement Certification Program (PIECP) was established by Congress in 1979 in an effort to address prison management concerns about prisoner idleness, to train the growing prison population in marketable job skills, and to benefit taxpayers through inmate wage deductions for room and board, victims' compensation, family support, and taxes. BJA's goal is to encourage partnerships between state and county prison industries and private sector companies that employ inmate workers in manufacturing operations that resemble the real world as closely as possible.

The sale of inmate-made goods in interstate commerce is prohibited except for projects certified by BJA as meeting the conditions of the PIECP statute [18 USC 1761(c)]. The prohibition applies only to originally manufactured *goods* produced by inmates that cross state lines, entering into interstate commerce. Service operations, such as refurbishing goods that have already entered into interstate commerce, are not prohibited. Goods produced in conjunction with private sector partners which do not cross state lines are subject only to *state* law which varies from state to state. Agricultural goods are exempt from regulation as are goods produced for a non-profit organization.

Over the approximately 30 years of its existence, the program has attracted primarily small and medium-sized private sector companies. Participation has been steady for several years at approximately 200 separate operations or Cost Accounting Centers (CACs) and 4,500 to 5,000 inmate workers nation-wide, though there has been a noticeable decline during the current economic recession (there were 188 CACs as of June 30, 2010).

BJA has Certified 43 jurisdictions as of 6/30/10. New Hampshire is in the process of applying for certification; Kentucky, Michigan, and Pennsylvania have introduced legislation.

As the program arm of the U.S. Department of Justice, BJA has no criminal enforcement power over violations of the PIECP statute. That power rests with the Criminal Division of the USDOJ. However, as the agency identified by Congress to administer the PIECP program, BJA does have the authority to rescind a jurisdiction's PIECP Certification if the jurisdiction is found to be out of compliance with PIECP mandatory requirements and if the jurisdiction is unwilling to work with BJA to come into compliance.

Since 1995, BJA has provided grant funding to the National Correctional Industries Association (NCIA) to perform assessments to provide BJA with sufficient information to make compliance decisions. NCIA's goal is to identify any non-compliant conditions and to assist the Certificate Holder to return to compliance within a reasonable period of time (usually 60 to 90 days). If compliance requirements cannot be met, BJA will rescind the PIECP Certificate.

Mandatory requirements include meeting legal and administrative eligibility criteria; the payment of a wage comparable to the wages of similarly situated civilian workers in the locality; the avoidance of displacement of civilian workers in the locality; the provision of benefits comparable to those made available to other workers on the basis of their employment (workers'

compensation and FICA in some cases<sup>1</sup>); voluntary inmate participation; wage deductions limited to 80% of gross salary and only for taxes, room and board, victims' compensation/restitution, and family support; prior notification to organized labor and local business organizations of proposed operations; and compliance with the National Environmental Protection Act (NEPA).

Grant funds have been significantly reduced in recent years, necessitating a cutback in the performance of on-site assessments. However, NCIA was funded to perform fifteen site assessments in 2010. When a site assessment is performed, a PIECP Certificate Holder must provide two actual payrolls along with wage determination letters from its State Department of Economic Security (DES). Information on wages paid to civilian workers used to set comparable wages for PIE workers is now available on the Internet through websites administered by State Departments of Labor and the Federal Bureau of Labor Statistics. Assessors use this information to determine whether inmate workers were paid the comparable wage, including overtime at time-and-a-half, and did not displace civilian workers in the locality where the work takes place. They review payrolls to determine if PIECP inmate workers were moved from training wages to full comparable wages once DES approved training times have expired. Deductions and benefits are also tracked by payroll and other financial documents; a review of voluntary participation forms and changes in NEPA are included in the on site assessment as well. Inmates are interviewed and each operation is toured by the assessor. Certificate Holders have taken the process seriously and submitted the required documentation without exception.

## **SCOPE OF THE ASSESSMENT PROCESS**

As of June 30, 2010 there were thirty (30) jurisdictions with active PIECP operations.<sup>2</sup> Of those, fourteen (14) jurisdictions had site assessments and one had a desk assessment (the CAC in question was no longer active) with a total of 38 CACs assessed. The assessments were performed by experienced prison industry managers with PIECP programs of their own, and by NCIA staff.

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<sup>1</sup> The IRS has ruled that only PIECP inmate workers who work in an Employer Model CAC, where the workers are directly supervised and paid by the private sector company, are eligible for FICA. In Customer Model CACs, where the inmate workers are supervised and paid by the prison industry operation, inmate workers are not eligible to participate in FICA.

<sup>2</sup> They included: Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Hennepin County (MN), Mississippi, Montana, Nebraska, Nevada, Strafford County (NH), North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas Oversight Authority, Utah, and Utah County (UT). There were 13 *inactive* Certificate Holders as of 3/31/09 including: Alaska, Belknap County (NH), Connecticut, Denver County Sheriff's Department, New Mexico, North Carolina, Ohio, Vermont, Virginia, Washington, Washington State Jail Industries Board, Wisconsin, and Wyoming.

	<b>SITE</b>	<b>DATE</b>	<b># CAC(S) ASSESSED</b>	<b>ASSESSOR</b>
1.	Arkansas	5/27/10	1	Bob Carter
2.	Colorado	4/30/10	3	Tony Ellis
3.	Florida	5/28/10	10	Sahra Nadiir
4.	Hennepin Cty (MN)	5/20/10	2	Wil Heslop
5.	Idaho	5/24-26/10	3	Gay Zalman
6.	Indiana	6/24/10	3	Lee Bond
7.	Kansas	6/23/10	3	Becky Deeb
8.	Maryland	6/8/10	1	Wil Heslop
9.	Minnesota	5/18-19/10	3	Tom Vohs
10.	Mississippi	5/25/10	1	Bob Carter
11.	Montana	6/23-24/10	2	Gay Zalman
12.	Nebraska	7/8/10	2	Wil Heslop
13.	North Carolina	7/16/10	1	Wil Heslop
14.	Oregon	5/18/10	2	Bob Carter
15.	South Dakota	7/14/10	1	Barbara Auerbach

## THE ASSESSMENT PROCESS

- ❑ In 2010, NCIA reviewed all active CACs and assessed the top 15 jurisdictions based upon the potential risk for non-compliance due to not being assessed for two or more cycles or for being a new project that had never been assessed. In most cases this resulted in the assessment of two or three CACs. In the case of Florida, where seven CACs were assessed because they had not been assessed for two or more cycles, it was cost-effective to assess the other three active CACs as well, since the assessor was already visiting the relevant institutions.
- ❑ Assessment materials were upgraded to reflect changes resulting from the previous assessment round as well as policy decisions made by BJA in the interim.
- ❑ NCIA hosted a Webinar training session for all Certificate Holders in January 2010, focused on all substantive and process requirements for the upcoming assessments. A separate Webinar training session was held for the assessors in February 2010. In March 2010, a PIECP Training Forum was held in Cincinnati where PIECP managers could review their individual practices against PIECP requirements.
- ❑ Prior to the assessment, the Certificate Holders provided NCIA with the requested information on wages, displacement as it relates to annual wage determination, benefits, deductions, voluntary participation, and changes NEPA conditions for all CACs to be assessed. Determinations of eligibility and non-displacement of civilian workers, as well as the notification of local private business and organized labor, take place at the time of CAC designation and therefore had already been reviewed.
- ❑ As much as possible, NCIA personnel and the assessor utilized email to transfer information among the parties to the assessment. All of NCIA's 2010 assessment materials were created in Microsoft Word and Microsoft Excel so that all parties could easily manipulate the information necessary to complete the assessment. Assessment materials also were available on NCIA's website: [www.nationalcia.org](http://www.nationalcia.org).

For each Certificate Holder:

- Program performance was compared against statutory and administrative requirements for participation in the PIECP.
- Payroll review for two separate months (June 2009 and January 2010) was performed to verify that comparable wages were actually being paid to PIECP inmate workers, including a comparison of training times authorized by the Department of Economic Security (DES) against actual time spent in training.
- Supporting documentation to and from the State DES for comparable wage and non-displacement determinations was reviewed and verified.
- Deductions for taxes (state, federal, and FICA), room and board, victims' compensation/restitution, and family support were examined and verified.

- The existence of Workers' Compensation insurance was verified by reviewing actual Workers' Compensation insurance policies or their equivalent and comparing coverage for PIECP inmate workers against their private sector counterparts (similarly situated civilian workers for Employer Model CACs and correctional industries employees for Customer Model CACs).
- The voluntary status of inmate workers was confirmed through verification of relevant documents and inmate interviews.
- Changes in NEPA since the time of designation were reviewed and the operation was toured by the assessor; inmate interviews also included questions on this topic.

What follows is an issue-by-issue description of the findings of the assessments. A summary discussion of substantive findings completes this report. All assessment instruments were developed in cooperation with and approved by BJA. They are publicly available at <http://www.nationalcia.org/pieforms.html>.

## **COMPLIANCE ASSESSMENT FINDINGS AND BJA DETERMINATIONS**

### **1. Eligibility**

BJA's 1999 Guideline states that all non-Federal departments of correction and juvenile justice agencies authorized by law to administer correctional industry programs are eligible for PIECP certification. Once certification is awarded, the Certificate Holder determines which specific operations will be included under the PIECP. All production operations, where a non-agricultural commodity/product is produced for sale to the for-profit sector on the open market and the product moves in interstate commerce, must be designated under the PIECP. Additional enterprises may be included at the Certificate Holder's discretion. Once included, all PIECP mandatory requirements must be met for all Cost Accounting Centers.

#### **Findings:**

All CACs assessed in 2010 had been through NCIA's certification and designation processes and therefore had already met this criterion.

### **2. Inmate Worker Wages**

The PIECP statute requires that inmate workers be paid "at a rate which is not less than that paid for work of a similar nature in the locality in which the work is performed." BJA's administrative Guideline for PIECP sets out procedures for determining the appropriate wage under various conditions. The Guideline expressly states that wage determinations must be made by State Department of Economic Security (DES) agencies. Certificate Holders must re-determine wages annually on or before the date the previous wage update was made. In November 2006, BJA further specified that because of an "across-the-board change in how wage data is reported by employment agencies...wages for PIECP inmate workers may not fall below the tenth percentile (unless their employment agency provides express written agreement of a wage less than the tenth percentile for a limited training period)."

## **Findings:**

As has been the case in all past assessments, wages continue to be the single most difficult requirement for PIECP Certificate Holders to implement. NCIA requested two separate payrolls for each CAC it assessed (June 2009 and January 2010), thus providing the assessors with a picture of wage practices over time and the opportunity to determine whether wages were raised on or before July 24, 2009 when the Federal Minimum Wage was increased.

Five of the fifteen jurisdictions assessed had wage issues of some kind and all have been resolved as of this writing. Back wages were assessed and paid in four of those jurisdictions; one Certificate Holder has yet to complete its back payments, but will do so in the near future.

### **a. The Training Wage Exception to the 10th Percentile Wage Floor**

As noted above, because wage data for all states had become available electronically, BJA determined in 2006 that wages must be set at or above the 10th percentile<sup>3</sup>, as defined by the State Department of Economic Security Agency. BJA takes the position that this is a “generous interpretation of *comparable*, yet still fair to competitor manufacturers because of the “lack of education, training, and experience typical of the inmate labor force.”<sup>4</sup> The one exception to the 10th percentile requirement is that inmate workers may be paid a training wage that falls below the 10th percentile if “their employment agency provides express written agreement of a wage less than the tenth percentile for a limited training period.”

Because the wage can never fall below the Federal or State minimum wage (whichever is higher), training wages in most jurisdictions fall somewhere between the Federal or State minimum wage and the 10th percentile. Of the states and counties assessed, eight use a training wage that starts at the minimum wage and progresses to the 10th percentile over a period of time: 60 days (Florida and Idaho); 90 days (South Dakota and some workers in Kansas); 130 days (Nebraska); 175 days (some workers in Kansas); 180 days (Indiana); 365 days (Montana); and 390 days (Mississippi).<sup>5</sup> Seven do not use a training wage: Arkansas, Colorado, Hennepin County (MN), Maryland, Minnesota, North Carolina, and Oregon.

The assessors found five jurisdictions where some PIECP inmate workers had worked longer at the training wage than the training period determined by the State DES. Back wages were paid in four of those cases, and will be paid in the near future in the fifth case. In one of the four cases there was legitimate confusion as to how to calculate wage increases for those individuals already moving through the training wage plan. In that case, back wages were not assessed for errors made during the training period, but were assessed for those workers who were not moved to the 10th percentile upon the completion of the approved training period. In another jurisdiction where back wages were assessed for inmate workers who had not been moved to the

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<sup>3</sup> meaning that 90% of all workers performing similar work earn more than this amount, and 10% earn less

<sup>4</sup> Letter to all Certificate Holders from Julius C. Dupree, Jr., PIECP Program Manager (November 17, 2006).

<sup>5</sup> Authority to set training wages rests with the State DES agency and therefore the length of time allowed varies from state to state.

10th percentile at the end of the training period, there was a legitimate misunderstanding as to how to measure the 10th percentile (versus a wage that would not displace local workers). Back wages were not assessed for the period during which the 10th percentile was incorrectly calculated.

**b. Annual Wage Updates Not Implemented in a Timely Fashion**

One jurisdiction did not implement wage updates on or before the anniversary date of the previous update and back wages have been paid.

**c. 10th Percentile Not Implemented as Wage Plan Floor**

One jurisdiction had not understood that the 10th percentile is the lowest possible wage to be paid to inmates unless the State DES provides an exemption for a limited training period. Because BJA had approved the jurisdiction's wage plan and there was legitimate confusion, back wages were not assessed, but the jurisdiction has revised its pay plan and will use the 10th percentile floor in the future.

Another jurisdiction did not use the 10th percentile as its wage floor, arguing that a piece work operation may use the Federal or State minimum wage (whichever is higher) as a floor, as is the case for similar community-based operations. BJA agreed with the Certificate Holder.

**d. Overtime Is Being Administered Correctly**

Overtime in every case was paid at time-and-a-half and piece work rates were at or above the minimum wage.

**e. Other Observations**

All jurisdictions now have converted to the use of SOC codes to describe the work being performed. As was the case in the previous assessment round, a few states had not included SOC codes for all inmate workers on the payroll, necessitating an additional request from the assessors to provide that information, without which it is impossible to determine whether a given inmate worker is receiving the appropriate wage. All jurisdictions have agreed to include SOC codes for all workers on the payroll in the future.

Thirteen of the fifteen jurisdictions assessed use the 10th percentile as the floor of their wage scale. One jurisdiction operates piece work shops and uses the Federal minimum wage as a floor; one other jurisdiction is in the process of amending its wage plan to include the 10th percentile as its post-training wage floor. Several assessors noted that training times seem to vary widely for the same work and expressed concern that they may not be comparable to civilian training times for similar work in the community.

**3. Displacement**

The PIECP statute requires that a PIECP project not "result in the displacement of employed workers, or be applied in skills, crafts, or trades where there is a surplus of available gainful

labor in the locality, or impair existing contracts for services." The 1999 Guideline repeats this same language, stating that the State Department of Economic Security should verify that the proposed PIECP project will not displace employed workers. In addition, the private sector company involved is required to provide a written statement that it will not displace its own workers in favor of PIECP inmates. A definition of displacement is provided in the Guideline that includes all the prohibited activities noted above, as well as the "inappropriate transfer of private sector job functions to PIECP inmates."

### **Findings:**

This element was reviewed and verified for all Certificate Holders at NCIA headquarters as part of NCIA's designation process. Displacement documents for all CACs were compiled and reviewed and all CACs were found to be in full compliance at the time of designation. As a secondary check, annual wage re-verifications also must take displacement into consideration.

As was the case in the previous assessment round, in a few jurisdictions the State DES expressed strong discomfort in making non-displacement determinations, particularly in the current economic downturn. In the end, determinations were made, but PIECP managers in those and other states expressed increased concern that in the future such determinations will be refused. NCIA will address this issue with BJA as part of its Guideline revision process.

## **4. Benefits**

Federal law requires that PIECP workers "have not solely by their status as offenders been deprived of the right to participate in benefits made available by the Federal and State government to other individuals on the basis of their employment, such as Workmen's Compensation." BJA's 1999 Guideline states that workers' compensation, and under certain circumstances (that is, for employer model projects where the inmate works directly for the private sector company), Social Security (FICA), must be provided to PIECP inmate workers.

### **Findings:**

**a. Workers' Compensation:** All jurisdictions assessed were providing Workers' Compensation coverage or its equivalent. One jurisdiction raised a Workers' Compensation issue when the assessor found the *amounts* of the coverage for inmates (for partial disability and death) in a customer model CAC were not comparable to the amounts of coverage for state employees, though the *types* of coverage were. The matter was referred to BJA for a decision and BJA determined that Workers' Compensation benefits must be comparable in *types* of coverage, but not identical in amounts. BJA further advised that the burden is on the Certificate Holder to show that the benefits are comparable to those in the private sector.

**b. FICA:** All employer model projects were found to be covering their PIECP workers under FICA, as is required by the PIECP Guideline.

## **5. Deductions**

Federal law provides that "wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows: (a) taxes; (b) reasonable charges for room and board as determined by regulations which shall be issued by the chief State correctional officer; (c) allocations for support of family pursuant to State statute, court order, or agreement by the offender; (d) contributions to any fund established by law to compensate the victims of crime of not more than 20 per centum but not less than 5 per centum of gross wages." BJA's 1999 administrative Guideline makes it clear that participating CACs are not required to take deductions from PIECP inmate wages. However, some deductions may be required under other Federal statutes, such as the Internal Revenue Code.

### **Findings:**

An issue arose in a few jurisdictions as to whether *court ordered* family support could be deducted both from gross wages (where specific provision is made for it) and from net wages (because it is a legal fine). BJA acknowledged that it may have issued conflicting advice on this question in the past. In response to questions arising during this assessment round, BJA has determined that *court ordered* family support may be deducted from both gross and net wages. *Voluntary* family support should be deducted only from gross wages, unless the inmate chooses to send additional monies out of his account (voluntary contributions are not considered as deductions).

## **6. Voluntary Participation**

Federal law requires that inmates "have participated in such employment voluntarily and have agreed in advance to the specific deductions made from gross wages pursuant to this section, and all other financial arrangements as a result of participation in such employment."

### **Findings:**

All Certificate Holders were found to have signed voluntary forms on file for all CACs. In two cases Certificate Holders were advised to revise their voluntary participation forms to include clear assurances that no more than 80% of gross wages could be deducted from the PIECP inmate worker's pay (with the exception of legal fines).

## **7. Consultation with Organized Labor**

Federal law requires that representatives of local union central bodies or similar labor union organizations have been consulted prior to the initiation of any project qualifying for any exemption created by this section. The 1999 Guideline expands the consultation requirement slightly by asking the Certificate Holder to contact all relevant unions, not just a single union which may or may not be the most directly involved in the production of items similar to those produced in a PIECP CAC. In addition, if there is no local labor union, the State organization must be informed in its stead.

**Findings:**

This mandatory criterion is among those reviewed by NCIA as part of its designation process. Certificate Holders either sent letters to the relevant unions or had written records of advisory board meetings where organized labor was represented.

**8. Consultation with Local Private Industry**

BJA's 1999 administrative Guideline states that applicants must consult with representatives of local businesses that may be economically impacted by CAC production prior to beginning operations and lays out minimum criteria for that consultation.

**Findings:**

This mandatory criterion is among those reviewed by NCIA as part of its designation process. All jurisdictions either sent letters to the local chamber of commerce or included representatives of local private industry on a correctional industries advisory board. Some jurisdictions did both. In a small number of cases, the department of corrections publishes its intentions to initiate a new PIECP CAC in a local newspaper.

**9. National Environmental Policy Act (NEPA)**

BJA's 1999 Guideline requires that all PIECP CACs must comply with NEPA and other related Federal environmental review requirements. Certificate Holders submit a request for BJA approval at the time they designate each CAC and BJA approves or disapproves the request at that time.

**Findings:**

None of the jurisdictions assessed had any changes in NEPA conditions since the time of the last assessment.

**SUMMARY DISCUSSION**

<b>PIECP ELEMENT</b>	<b>NON-COMPLIANCE</b>	<b>CURRENT STATUS</b>
<b>WAGES</b>	<b>5</b>	<b>Resolved (one not complete)</b>
<b>DISPLACEMENT</b>	<b>none</b>	
<b>BENEFITS</b>	<b>1</b>	<b>Resolved</b>
<b>DEDUCTIONS</b>	<b>1</b>	<b>Resolved</b>
<b>VOLUNTARY PARTICIPATION</b>	<b>none</b>	
<b>NEPA (Changes)</b>	<b>none</b>	

Fifteen jurisdictions were assessed on six separate PIECP required elements as part of the site assessments: Wages, Displacement, Benefits, Deductions, Voluntary Participation, and changes in NEPA (Eligibility, Consultation with Labor and with Business, and compliance with NEPA are assessed at the time of Certification and Designation). Therefore there is potential for a maximum of 102 separate instances of non-compliance. In fact, the non-compliance instances found by the assessors totaled 7. All but one have been resolved as of this writing, and that issue will be resolved in the near future.

Of the seven instances, four involved training wage problems, one involved a lack of understanding of the PIECP 10th percentile requirement, one involved a disagreement over court ordered family support, and one involved a disagreement about the amount of workers' compensation benefits.

## WAGES AS THE KEY ASSESSMENT ISSUE

Most PIECP workers continue to earn wages at or slightly above the 10th percentile, in part because much of the work is entry level and in part because workers are untrained and inexperienced. It appears that labor intensive work is the kind of work that companies are willing to bring to the prison or jail setting, with few exceptions. PIECP managers also look for labor intensive work, in the belief that the companies most likely to consider inmate labor are not those with highly skilled labor needs.

BJA's Guideline identifies the State DES agencies as the authorized decision-makers as to wage ranges for PIECP inmate workers. BJA does not exercise independent judgment as to wage determinations made by the State DES agencies since only the State DES agencies have the knowledge to determine local labor conditions and practices, and thus "comparable" wages. Wage findings that lie outside the ranges identified as comparable by a State DES agency are considered to be out of compliance with BJA's PIECP regulations.

PIECP managers take BJA's compliance requirements seriously and make every effort to meet those requirements. Despite the issues relating to 10th percentile and training practices described above, wage procedures have markedly improved. Almost all jurisdictions now implement their annual wage updates on or before the anniversary date of the last update. Most make a good faith effort to accurately identify the appropriate SOC code for the work being performed. There is a need to clarify the parameters of comparable training wages and time periods, and BJA will consider this as part of its upcoming Guideline revision process. A clearly stated back wage policy will also be part of that revision process.

## OTHER ASSESSMENT ISSUES

Changes in policy resulting from this assessment cycle include an expansion in interpretation of what constitutes "comparable" Workers' Compensation coverage for PIECP inmate workers in customer model CACs and a clarification as to court ordered family support. Certificate Holders are put on notice by BJA that the burden of proof as to the comparability of Workers' Compensation coverage, but also given some flexibility in making those calculations as long as benefits are comparable to those available to private sector counterparts. On court ordered

family support, Certificate Holders may now deduct such payments from the 20% net wages upon proof of the court's demand.

## CONCLUSION

As noted in previous reports, challenges to the PIECP Guideline continue to occur. The complex nature of PIECP requirements, coupled with high turnover among PIECP managers, creates the ongoing potential for non-compliance of PIECP CACs. Clearly, there is a need for regular review of operations so that BJA can continue to evolve its policies to meet the changing needs of its Certificate Holders. PIECP assessments are the logical vehicle to achieve that end. BJA has made funding available to NCIA to site assess an additional set of jurisdictions during the 2011 Calendar Year.