

Section 14(c) Subminimum Wage Certificate Program

Introduction

While the US Department of Labor's Wage and Hour Division makes it clear that the Fair Labor Standards Act Section 14(c) Subminimum Wage Certificate Program (the 14(c) program) should not be the first or primary option for employment of people with disabilities¹, the 14(c) program continues to be used in the employment of over 420,000 people with disabilities across the country.² Each subcommittee of the ACICIEID discussed the 14(c) program. This document reports the findings, conclusions and recommendations of each subcommittee.

Transitions to Careers Subcommittee

Findings and Conclusions

WIOA, Section 511 provides limitations on the use of subminimum wage programs for youth transitioning from secondary education and on schools regarding contracts with 14(c) certificate holder. The intent of WIOA is to insure that transition from secondary education and/or postsecondary education to competitive integrated employment is the primary goal for youth in transition, including youth with significant disabilities.

School-Based Work Experience Programs (SWEPs) are a type of 14(c) subminimum wage certificate that are typically issued for schools, but work may occur in a variety of locations, including in the community. There are 270 active SWEPs certificates nationally. The U.S. Department of Labor, Wage and Hour, is unsure of the number of students associated with each of these certificates. It was determined in 2013 that 75% of SWEPs nationally were issued in California (CA). As of spring 2014, California's Department of Education is preventing the use of SWEP certificates in majority of its transition programs, specifically in the Workability Program. It is expected that this policy change will virtually eliminate the use of subminimum wage certificates issued by CA schools.

There is no evidence that use of SWEP certificates improves postsecondary outcomes for youth with disabilities. And, there is varied information about the capacity for increasing competitive

¹ WHD Presentation to Committee

² General Accounting Office (GAO), September 2001, Special Minimum Wage Program, *Centers Offer Employment and Support Services to Workers with Disabilities, But Labor Should Improve Oversight* GAO-01-886, Page 4.

integrated employment opportunities for youth with significant disabilities in regions that have historically been dependent upon sheltered workshops/14(c) license holders. Youth have greater likelihood of exiting school with integrated jobs at competitive wages when their transition programming focuses on ensuring that work experiences are based on their interests, are in community-based, integrated employment settings, and workplace supports are provided as needed.

Preliminary Recommendations

1. The Department of Labor (DOL) must immediately discontinue issuance of School-based Work Experience Program (SWEP) certificates.
2. IDEA Indicator 13 must disallow a placement in a subminimum wage [14(c)] program as an acceptable post-school transition goal or service on the transition plan.
3. Any reauthorization of IDEA must disallow, as an authorized transition service, any facility-based employment or service provided by a 14(c) license holder.
4. The Department of Education (DOE) should coordinate with DOL to identify Local Education Agencies (LEAs) that are 14(c) license holders and assist these LEAs to transform to other proven transition models for youth that include community-based integrated internships and other types of community-based integrated work experiences that lead to competitive integrated employment.
5. Federal agencies to include DOE, RSA, Medicaid Long-Term Supports and Services, should collaborate to design a study and mechanism that provides for data collection to indicate where youth end up when sheltered workshops close or downsize in a community.
6. The Transition to Careers Sub-Committee finds that critical data are lacking from DOL Wage and Hour regarding the number of youth using 14(c) certificates, their ages, disability-type, wages, work hours, down time and other information. Having access to these data will be imperative to making future recommendations and identifying trends - both positive and negative. The Sub-Committee recommends that DOL Wage and Hour develop a required data collection system and make specific recommendations to states to more closely monitor use of 14(c) certificates by youth and all individuals with disabilities. Such data could be modeled upon the system utilized currently in Wisconsin.

Capacity-Building Subcommittee

Findings and Conclusions

Based on data from the U.S. Department of Labor Wage and Hour Division, in 2010, there were approximately 3,300 entities in the United States which hold 14(c) subminimum wage certificates (www.dol.gov/whd/specialemloyment). The actual number of individuals being paid subminimum wage is more difficult to determine since that data is not tracked by the Department of Labor. The most recent federal analysis was conducted in 2001 when the

Government Accountability Office (GAO) estimated that 424,000 individuals were being paid subminimum wage. It is unknown how closely the current number of individuals paid subminimum wage approximates this finding but, given the previously cited Butterworth, et al. (2014) study about the growth of individuals in center-based employment, this number it is likely to have grown accordingly since the GAO study.

This circumstance is an indication that the existing service culture can be a contributing factor to historically low employment expectations as well as simultaneous, and perhaps inadvertently, a perpetuator of these low expectations. In other words, the fact, for example, that most of the individuals with I/DD and other significant disabilities who are served by the I/DD system are in some type of center-based or facility-based environment, suggests a systemic belief that not much else is possible, except for a relatively small minority of persons served. At the same time, these services, which primarily offer an accompanying subminimum wage when work is available, have often led to the conclusion that this type of work and/or productivity is the most that can be expected. Thus, one by-product of subminimum wage employment is a service culture with a consequent low expectation for community integrated employment.

Preliminary Recommendations

7. DOL should provide WHD with sufficient funding and staffing resources to provide monitoring and oversight of the section 14(c) certificate program and to collect data regarding the number of individuals earning subminimum wage, the number of individuals moving from subminimum wage to CIE, the number of individuals who stagnate at the subminimum wage level (and, if possible why – e.g. family pressure, fear of losing other benefits, inability to work longer hours, etc.), and the number of individuals who do not continue working. This information can be used to inform the time frame for phasing out the Section 14(c) certificate program.
8. DOL/WHD (Wage and Hour Division) should identify a time frame for phasing out Fair Labor Standards Act (PL 75-718), Section 14(c) certificate program.

Complexity and Needs Sub-Committee

Findings and Conclusions

The Fair Labor Standards Act (FLSA) as adopted into law in 1938 provided that the Federal Wage and Hour Administrator “to the extent necessary to prevent curtailment of opportunities for employment,” shall provide for “the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under the law and for such period as shall be fixed in such certificates.” In 1986, Congress amended Section 14(c) of the FLSA to require that individuals with disabilities who are “not entitled to earn the minimum

wage” must earn a wage commensurate with what “non-handicapped” workers employed in the vicinity earn for the same type, quality, and quantity of work, factoring in productivity.

Employers seeking to apply for or to renew special minimum wage certificates must apply to the Wage and Hour Division (WHD) of the Department of Labor (DOL). The WHD determines whether the certificate is necessary to prevent the “curtailment of opportunities for employment.”

A report from the Inspector General³ found problems in DOL/WHD oversight of 14(c) with a pattern of noncompliance by employers that failed to properly review and maintain certificates.

Many states have laws that establish local minimum wage standards. An agency is usually appointed to monitor and enforce the standards and to enforce the rules that govern permission to pay subminimum wage. State efforts to monitor the payment of subminimum wages vary in quality.

Across the nation there are thousands of employers that hire people with disabilities. Any employer that hires a person with a disability may apply for a 14(c) certificate to pay subminimum wage. However, according to the General Accounting Office, Special Minimum Wage Program report, GAO-01-886, 95% of all workers with disabilities being paid less than minimum wage under the 14(c) program were employed by sheltered workshops, not typical employers.

The sheltered workshop model was originally designed to provide general training and experience for people to help them move to competitive jobs. The model has not worked for people with disabilities. The same GAO report regarding the Special Minimum Wage Program estimates that less than 5% of the workers left to take a job in the community.

Research shows that people with significant disabilities are successfully employed in much the same way as people without disabilities. The person’s skills, abilities and interests are identified and matched to available jobs. Training, if needed, is tailored to the job.

Most people in sheltered workshops or pre-vocational services stay in those programs and do not move on to competitive integrated employment (CIE). For example, according to a recent Department of Justice (DOJ) Findings Letter, nearly half (46.2%) of the people in sheltered workshops in Rhode Island had been there for a decade or longer and over a third (34.2%) were there for 15 or more years. Similarly, the DOJ found that the average stay in sheltered workshops

³ <http://www.oig.dol.gov/public/reports/oa/2001/05-01-002-04-420.pdf>

in Oregon was more than a decade (11.72 years) while some people reported staying for 30 years or more.

The International Encyclopedia of Rehabilitation reports from a 2008 survey that U.S. citizens working in sheltered workshops earned about \$101/month. They work an average of 74 hours a month and earn about \$1.36/hour.

Current experience demonstrates that people with significant disabilities with access to needed supports can work at typical jobs in typical places at minimum wage or higher. FLSA 14(c) provisions that may have been regarded as necessary and even progressive in 1938 are incompatible with current knowledge, practice and experience.

Section 511 of the Workforce Innovation and Opportunity Act (WIOA) makes several changes to the 14(c) section of the Fair Labor Standards Act (FLSA) including:

- Places limitations on the payment of subminimum wages by any employer holding FLSA 14(c) special wage certificates.
- Requires people with disabilities working in 14(c) programs to have access to competitive integrated employment (CIE) services including vocational rehabilitation (VR) services.
- Requires that anyone age 24 or younger may not start work at subminimum wage unless it is documented that the person received transition services under the Individuals with Disabilities Education Act (IDEA); has applied for VR services and was unsuccessful; and has been provided counseling and referral to other resources with the goal of CIE.
- 14(c) certificate holders may not continue to employ any person at subminimum wage unless the person has received career counseling; access to the VR agency; and information about self-advocacy, self-determination and peer mentoring opportunities from an entity without a financial interest in the person's employment outcome.

While Section 511 attempts to limit the use of 14(c) certificates, it also offers pathways to 14(c) programs by incorporating 14(c) language into WIOA; by offering 14(c) as an option for people older than 24; and by offering 14(c) programs as a viable employment training option when the data show that people usually do not leave 14(c) programs for CIE.

There are other federal agencies that are having an impact on states use of 14(c) certificates and interest in increasing access to CIE. *Olmstead* enforcement activities by the Department of Justice (DOJ) and private plaintiffs are leading states to closely examine whether people with disabilities have an opportunity to participate in CIE or whether they are unnecessarily segregated in traditional day programs, including 14(c) sheltered workshops.

States are currently transforming their day support systems as part of the “transition planning” process to comply with the new Home and Community Based Services (HCBS) Settings Rule from the Centers for Medicare & Medicaid Services (CMS). The rule, among other things, requires that HCBS waivers offer more opportunities for competitive employment, control over daily lives and access to the broader community. Some services, including sheltered workshops, may not be able to comply. In addition, the Rule requires that all people be offered opportunities to receive services and supports in “non-disability specific settings” (settings which are not exclusively or primarily for people with disabilities.) These provisions will require most states to expand CIE options.

Due, in part, to the policy changes described above, a number of states have taken steps to limit or phase out the use of 14(c) certificates and/or sheltered workshops. Recently, New Hampshire (NH) with the support of its 14(c) certificate holders passed a law that prohibits paying workers less than minimum wage. Maine and Vermont closed all sheltered workshops. Several other states recently issued transition plans to phase out workshops as they come into compliance with the HCBS Settings rule. Other states are considering minimum wage laws similar to NH.

The National Council on Disability recommended gradual phase-out of the 14(c) program after completing a six-state investigation of 14(c) and the feasibility of replacing the program with investments in supported employment.

Preliminary Recommendations

9. Implement a well-designed phase-out of the 14(c) program that results in people with disabilities entering competitive integrated employment. Payment of subminimum wages is inconsistent with current knowledge of the skills and talents of people with significant disabilities. Recognizing that thousands of people with disabilities and their families will be affected by a phase-out, the Committee will recommend a phase-out plan with specific implementation steps in the Final Report, September 15, 2016. This plan will emphasize that competitive integrated employment is the primary role of all working age people. It will consider strategies to expand CIE capacity and the potential role of other wraparound services (such as mainstream community activities and formal integrated day services) to address the concern that individuals leaving or who otherwise would have been in 14(c) programs will be left without meaningful and productive ways to spend their time.
10. The Wage and Hour Division (WHD) at the Department Labor (DOL) should develop and enforce criteria for assuring that the 14(c) certificate is only permitted when “necessary... to prevent the curtailment of opportunities for employment.”
11. The DOL should develop an interagency process to coordinate issuance/renewals of 14(c) with DOJ enforcement activities under the Americans with Disabilities Act (ADA), the HHS Office of Civil Rights, the Equal Employment Opportunity Commission and with CMS implementation of the HCBS Settings Rule.

12. WHD should require any state that allows the use of 14(c) certificates to address why the certificate is “necessary” and to describe the state’s plan for remedying the “lack of employment opportunities.” The state may respond with its *Olmstead* plan; its plan for implementing the HCBS Settings Rule; or its WIOA unified plan. Each of these state plans requires addressing how supports will be provided in more integrated settings. The state should ensure that the plan on which it relies to justify the time-limited use of 14(c) includes specific steps on how it will address lack of employment opportunities through strategies other than the use of 14(c) certificates.
13. The WHD should collaborate with state wage and hour monitoring agencies to increase the overall effectiveness of monitoring 14(c) programs and enforcing wage and hour requirements.
14. The Departments of Labor and Education should make enforcement of the law and spirit of Section 511 a priority. The Departments should work with agency field offices and state advocates, including Protection and Advocacy organizations, to identify enforcement actions that will help end the practice of paying people subminimum wages and expand competitive integrated employment with full wages and benefits.
15. In enforcing *Olmstead* provisions, the DOJ and the Office of Civil Rights (OCR) at the Department of Health and Human Services (HHS) should provide technical assistance to states that are engaging in affirmative *Olmstead* planning to increase opportunities for CIE and reduce the need for enforcement.
16. CMS should enforce the guidance provided in the September 16, 2011 CMS Informational Bulletin regarding the time-limited nature of pre-vocational services. Enforcement should emphasize that the goal is to move toward competitive integrated employment (CIE) not to other segregated day services.
17. In their efforts to enforce the HCBS Settings Rule, CMS should offer technical assistance resources and funding to states that want to use it as an opportunity to move toward CIE options for people in sheltered work. Such technical assistance should include supports to 14(c) certified programs that desire to change business models to provide CIE.

Marketplace Dynamics Subcommittee

Findings and Conclusions

The Fair Labor Standards Act Section 14(c) provides for the payment of sub-minimum wages to workers whose “earning or productive capacity is impaired by age, physical or mental deficiency, or injury... to the extent necessary to prevent curtailment of opportunities for employment” (29 U.S.C. § 214(c)). To address the issues related to FLSA 14(c) and evaluate options for improved oversight, the Marketplace Dynamics subcommittee: reviewed written public testimonies, research directed to subminimum wage, and the Wage and Hour Division (WHD) employer certificate application; invited SourceAmerica staff to expand on their January public testimony to ACICIEID regarding improved oversight to 14(c) via conference call; and

gave thoughtful and careful consideration to the charge directed to the WIOA Advisory Committee. The Marketplace Dynamics Subcommittee members posed the following question: “From a business perspective, is 14(c) necessary ‘to prevent the curtailment of opportunities for employment’ for people with IDD and other significant disabilities?” All findings, conclusions, and recommendations are intended to respond to this question as viewed through a business lens and are summarized below.

In 2001, the General Accounting Office (GAO) report on the 14(c) stated that the Department of Labor (DOL) historically placed a low-priority on the program and lacked the information required to effectively manage it, including accurate information on the number of 14(c) employers and workers or on DOL’s own compliance efforts. The report concluded that the DOL did not effectively manage the special minimum wage program or adequately ensure employer compliance with 14(c) requirements (US General Accounting Office, 2001).

Since then, DOL has instituted methods to improve the 14(c) program, however, challenges remain because 14(c) certificates are attached to the employer and not the worker with a disability making it difficult to accurately know the numbers of workers receiving subminimum wages. Additionally, resource and authority constraints limit WHD’s capacity to adequately monitor each nonprofit or business utilizing the employer certificate with the existing WHD data collection system. The fact that WHD has only revoked one employer certificate in recent history coupled with the generally weak penalties issued to those found in violation of the law contribute to a system that appears to remain highly susceptible to abuse (Department of Labor, 2015; Department of Labor, 2014).

The scope of these abuses range from the miscalculation of workers’ productivity and appropriate hourly rates to large-scale cases of fraud. A 2011 review of 154 randomly selected employers holding employer certificates found that 60%-70% were not in compliance with various administrative requirements of the 14(c) regulations (US Wage and Hour Division, 2011). In one of the most extreme examples, the former President of the National Center for the Employment of the Disabled (NCED), a non-profit located in El Paso, Texas, intentionally and inaccurately self-certified that NCED had the appropriate number of employees with significant disabilities and was later convicted of conspiring to defraud the federal government of \$800-\$900 million in no-bid contracts (Federal Bureau of Investigation, 2011).

Consequently, the Marketplace Dynamics Subcommittee believes even with suggestions on improved oversight, the employer certificate program remains highly vulnerable to abuse. Although it is assumed that employer certificate holders will abide by Federal disability policies, there is nothing in the employer certificate application that requires assurance that the Americans with Disabilities Act is enforced.

The Marketplace Dynamics Subcommittee researched previous initiatives to eliminate sub-minimum wage as part of its effort to examine section 14(c) more broadly. For example, a 2007 study found that legislative policies focused solely on eliminating sub-minimum wages in Arizona, British Columbia, and New Zealand resulted in unintended negative consequences for employees with disabilities. In order to comply with policies prohibiting the payment of subminimum wage, sheltered work programs converted to training or non-work programs. Following the conversion, workers either lost employment altogether or were paid “training stipends” that were even less than the sub-minimum wages had been. Ironically, policies designed to lead to increased earnings resulted instead in the loss of the minimal protections assured through FLSA Section 14(c) (Butterworth et. al., 2007).

In sum, the study concluded that in order to effectively eliminate the sub-minimum wage, there had to be simultaneous efforts to build capacity in sheltered work programs while ensuring that all employees receive high-quality services to secure competitive, integrated employment opportunities. The same study found that of the over 5,000 employers who hold subminimum wage employer certificates, less than 1% of these employers are private businesses (Butterworth et. al, 2007).

Capacity-building efforts must be directed towards helping programs that currently hold special wage certificates to navigate any changes to sub-minimum wage regulations. Care must be taken to ensure that regulatory changes to Section 14(c) do not lead to a superficial reclassification of the services provided with no net increase in competitive, integrated employment outcomes for individuals with intellectual, developmental, or other significant disabilities. Capacity-building at all levels is critically important to increasing competitive, integrated employment outcomes. Service providers, educators, and government agency personnel need training and technical assistance to learn and consistently utilize best practices for identifying employment goals, addressing barriers, and securing competitive, integrated employment outcomes for individuals with significant disabilities.

Sub-minimum wage provisions essentially make the argument that a worker’s value can and should be evaluated solely on the basis of his or her productivity. Opponents of the FLSA 14(c) policy argue that most businesses consider a broader range of characteristics than productivity alone when characterizing a “quality” employee, including factors such as reliability and accuracy (Butterworth et. al., 2007; DiLeo, 2011). Additionally, productivity levels are not static, but rather are the product of a variety of factors, most significantly the quality of the match between the employee’s skills, the accommodations provided if needed, and the specific job tasks. Tasks that better align with the employee’s skills tend to enhance productivity. Employees who exhibit low productivity for months or years likely are not being assigned job tasks that align well with their skillsets. Training of individuals with significant disabilities is imperative

and many individuals on subminimum wage have not received sufficient training to increase their skillsets and productivity.

In spite of the arguments in support of sub-minimum wage, the overwhelming majority of for-profit businesses currently employing individuals with IDD or other significant disabilities offer competitive wages. Beyond this, some businesses reportedly raised the concern that paying sub-minimum wages offered an unfair competitive advantage to companies holding employer certificates (Butterworth et. al., 2007).

Individuals who want to earn more money may still experience trepidation about leaving friends and familiar environments behind. Changing jobs is commonly considered on lists of “major life stressors” and it should not be considered any less so for individuals with disabilities transitioning out of segregated employment in spite of the belief that making the change will ultimately be in their own best interest.

Segregated service program staff adept at managing workshop activities or overseeing production contracts may not have the requisite skills necessary to support individuals with intellectual, developmental, or other significant disabilities to navigate the transition to CIE. Similarly, other employment service programs may need additional training or staffing to appropriately meet the needs of individuals transitioning out of segregated employment. Sufficient funding must be allocated to guarantee every person making the transition to CIE has access to all necessary services and supports, including but not limited to: Discovery and customized employment services, benefits planning, and assistive technology or other accommodations.

Capacity-building initiatives targeting community businesses as well as service systems might yield a wider variety of employment outcomes for individuals with IDD and other significant disabilities. Resource allocation for staff time to work on inclusive employment initiatives, support business expansion, or fund job creation strategies would allow for greater innovation between public and private entities.

Preliminary Recommendations

The Marketplace Dynamics Subcommittee believes that after more than seven decades of use, the minimum wage employer certificate program under Section 14(c) of the Fair Labor Standards Act is not effective, has not been thoroughly enforced by the Wage and Hour Division of the Department of Labor, and has served as a barrier to implementing competitive integrated employment for individuals with disabilities. Moreover, as the U.S. Department of Justice has stated, the on-going use of certificates under Section 14(c) is contrary to the intent and spirit of the Americans with Disabilities Act and the Supreme Court’s Olmstead decision. As such, the Marketplace subcommittee calls for a planned phase-out and ultimate elimination of Section

14(c) of the FLSA. The Marketplace Subcommittee believes a gradual phase-out is a more prudent way to reduce the reliance on sub-minimum wages without engendering the unintended consequences that resulted from previous efforts mandating their immediate elimination. Specific recommendations related to phase-out and elimination are as follows:

18. Institute a gradual phase-out of the Section 14(c) sub-minimum wage provision over a period of 8-10 years coupled with targeted, strategic capacity-building initiatives and resource allocation. Develop a careful, detailed plan that recognizes the multi-faceted, complicated process required to successfully phase out FLSA Section 14(c). The plan should include a chronological sequence for meeting all capacity-building needs along with detailed steps for addressing all corollary areas that will be impacted when FLSA Section 14(c) has ended.
19. Cease new referrals of individuals with disabilities into sub-minimum wage programs by December 31, 2016. Part 397 of WIOA amends Section 511 of the Rehabilitation Act to add additional requirements for state VR agencies before individuals under the age of 24 can be referred to sub-minimum wage employment and mandates annual reviews for anyone in sub-minimum wage employment. The Secretary of Labor should clarify how these provisions apply to individuals not receiving services through public VR agencies and institute a tracking system to ensure that these requirements are met for all individuals in subminimum wage employment.
20. Cease accepting new employers that have submitted an application for an employer certificate by December 31, 2015.
21. Cease renewal of employer certificates that must be reviewed on an annual basis by WHD, one year prior to the phase-out of FLSA Section 14(c).
22. Allocate resources and establish systems before individuals, if they choose, begin the transition to competitive, integrated employment. In order to avoid any unintended harm to individuals with significant disabilities, it is critical that infrastructure is developed and in place prior to individuals beginning the transition out of segregated employment. Resources must also be allocated and directed to support individuals who do not choose community employment to explore other individualized options for integrated day services. Given that FLSA was enacted in 1938, it is well past time to move into the 21st Century and guarantee opportunities that recognize the rights to equal access to innovative education, work, housing and community.
23. Engage subject matter experts to oversee and support the implementation of phase-out plans and to ensure all critical actions are taken, funding is allocated, and all systems are up and running before the phase-out of Section 14(c) timeline concludes. Subject matter experts must understand the complex nature of the Section 14(c) phase-out as well as the critical need for comprehensive and coordinated planning.
24. Set up an Advisory Committee to oversee the phase-out of Section 14(c). The Advisory Committee should include business representatives, subject matter experts from Federal agencies as well as outside experts who have researched the effects of eliminating subminimum wage and can provide lessons learned from other countries and in the US.

25. Emphasize Training. Innovative training options based on the assumption that all individuals with significant disabilities can learn and perform higher-level job duties that align with their skillsets and interests given the opportunity and appropriate accommodations must be available to all individuals transitioning from segregated work settings. Strategic plans include capacity building opportunities for individuals as well as for systems. Given the limited opportunities for people with significant disabilities to receive quality education, choose where they want to live, access innovative training, secure higher-level employment, and live in the communities of their choice, the reality is that society may well have no idea of what people with ID, DD and have other significant disabilities can do.

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