

Chapter Three: AbilityOne®

The development of this AbilityOne chapter is a result of a joint collaboration between two subcommittees of the ACICIEID: the “Complexity and Needs in Delivering Competitive Integrated Employment” subcommittee and the “Marketplace Dynamics” subcommittee. Both subcommittees identified AbilityOne as being within their respective purviews. After each subcommittee presented their initial findings, conclusions and recommendations to the full ACICIEID at its May, 2015 meeting, the two subcommittees met jointly to create and reach consensus on this interim report chapter. While the process allowed for the inclusion of recommendations in this chapter that are supported by one but not both subcommittees, discussions resulted in consensus being achieved for all of the preliminary recommendations included in this chapter.

It is important to note that the AbilityOne Program’s name is the Committee for Purchase from People Who Are Blind or Severely Disabled. However, this independent Federal agency will be referred to as AbilityOne throughout this chapter as the AbilityOne name was approved by Congress in 2006. In consideration that the AbilityOne Program is in its 77th year of operation in 2015 having begun in 1938, a thoughtful review of the AbilityOne Program, findings, conclusions and recommendations are summarized below.

Overview of AbilityOne Program

The Javits–Wagner O’Day (JWOD) Act is a Federal law passed in 1971 that requires all Federal agencies to purchase specified supplies and services from nonprofit agencies employing persons who are blind or have other significant disabilities. JWOD expanded upon a much older Federal law – the Wagner-O’Day Act – passed in 1938, the same year that the Fair Labor Standards Act was passed with provisions permitting people with disabilities to be paid subminimum wages under Section 14(c) of the Act. This was done because in the midst of the Great Depression it was thought to be the only way to create any employment opportunities at all.

The AbilityOne program grants noncompetitive contracts to Non-Profit Affiliates (NPAs), community rehabilitation programs (CRPs) formally affiliated with the AbilityOne program. NPAs provide specified products and services to agencies of the Federal government. The specified supplies and services are determined by the AbilityOne Commission, a Federal agency charged with administering the JWOD Act. The qualified NPAs must ensure at least 75% of the labor hours necessary to complete AbilityOne contracts are done by people who are blind or have other significant disabilities. The NPAs that participate in AbilityOne may pay subminimum wages to individuals with disabilities working on these contracts using authority granted through Section 14(c) of the Fair Labor Standards Act (FLSA).

In Fiscal Year 2014¹, the AbilityOne program allotted approximately \$2.8 billion in noncompetitive Federal contracts to NPAs that employ people who are blind or have other significant disabilities. This represents a major investment in creating employment opportunities and it must be used and leveraged effectively consistent with the ADA and best practices.

Source America and the National Industries for the Blind (NIB) are the Central Nonprofit Agencies (CNAs) that work with AbilityOne NPAs. NIB oversees approximately 84 NPAs that receive contracts through AbilityOne, while Source America oversees approximately 500 NPAs that receive these contracts. In 2014, the overall income from sales of goods and services to the Federal government by NIB NPAs was \$612.8 million while Source America's NPAs had income of \$2.269 billion from sales of goods and services to the Federal government. Both NIB and Source America receive a fee from each NPA after a contract is completed.

The AbilityOne Commission is a fifteen (15) member Commission that provides oversight of the program and consists primarily of senior procurement executives. Four (4) members are private citizens knowledgeable about the employment of people who are blind or have other significant disabilities. Because the AbilityOne Commission's primary statutory responsibility is to make decisions about the suitability of products and services for the Procurement List, and to ensure Federal procurement policy supports the AbilityOne program, most of the Federal agency appointees are not experts in either disability policy or evidence-based practices that shape our nation's modern-day thinking directed to integrated competitive employment and economic self-sufficiency for Americans with disabilities. Only the Federal appointees from the US Department of Education (Rehabilitation Services Administration) and the US Department of Labor's Office of Disability Employment Policy (ODEP) bring that kind of expertise. It is worth noting however that while the US Department of Justice has traditionally been represented on the Commission by a senior procurement specialist from the Bureau of Prisons, attorneys from the Civil Rights Division have recently provided the Commission with expert advice related to competitive integrated employment.

According to the AbilityOne Annual Report for fiscal year 2014, there were 46,621 workers across 565 agencies engaged in contract work under Ability One. In contrast, according to a recent AbilityOne Commission memo, over the last five years, the participating NPAs each

¹ AbilityOne Fiscal Year 2014 Annual Report. See: http://www.jwod.gov/media_room/documents/Commission_AnnualReport_Final_040815_nocropmarks_508v2_FINAL.pdf

placed, on average, just over 40 individuals who are blind or have significant disabilities into competitive employment or supported employment each year.²

Intersection between AbilityOne and Use of FLSA Section 14(c) Subminimum Wage Certificates

With regard to workers being paid subminimum wage under FLSA Section 14(c), the AbilityOne 2014 Annual Report confirms that 4,426 individuals (9.5%) working on AbilityOne contracts were paid less than minimum wage. The following is based on detailed data that was also reported in the AbilityOne 2014 Annual Report:

Workers paid less than \$5.00/hour:

- A total of 2,599 individuals who are blind or have significant disabilities worked on AbilityOne contracts and were paid less than \$5.00 per hour.
- 46 participating NPAs employed 2,473 people at subminimum wage on product contracts. These individuals averaged 5.88 hours of work per week on these AbilityOne contracts.
- 4 participating NPAs employed 126 people at subminimum wage on service contracts. These individuals averaged 7.46 hours of work per week on these AbilityOne contracts.

Workers paid \$5.01-\$7.24/hour:

- A total of 1,827 individuals who are blind or have significant disabilities worked on AbilityOne contracts and were paid between \$5.01 and \$7.24 per hour.
- 30 participating NPAs employed 1,402 people at subminimum wage on product contracts. These individuals averaged 8.12 hours of work per week on these AbilityOne contracts.
- 14 participating NPAs employed 425 people at subminimum wage on service contracts. These individuals averaged 16.50 hours of work per week on these AbilityOne contracts.

Findings and Conclusions:

The Javits Wagner O'Day Act was passed into law 44 years ago in 1971 and has not been substantially updated since that time. Much has changed in terms of Federal policy regarding individuals with disabilities. Our country has largely left behind this era, as children with significant disabilities are no longer barred from public schools, life-long institutionalization is no longer expected or tolerated, and assumptions about people's inability to learn, contribute and exercise self-determination are now widely rejected. With regard to Federal employment policy,

² AbilityOne Commission memo to Jennifer C. Sheehy, Designated Federal Officer for the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities. May 11, 2015.

competitive, integrated employment, as part of the mainstream workforce, is now the expected and priority outcome that the Federal government and many states are embracing. AbilityOne has not evolved far enough and does not fully reflect modern disability policy goals, including those enshrined in the Americans with Disabilities Act.

AbilityOne Perpetuates People with Significant Disabilities Working for Community Rehabilitation Programs rather than Mainstream American Businesses

Although transitions of AbilityOne participants into competitive, integrated employment outside the program are occurring at a modest rate, the program's primary business model still involves CRPs functioning as the employer of record for AbilityOne participants. The AbilityOne program currently places no obligation on participating CRPs to facilitate competitive integrated employment outside the program for individuals eligible for or working on AbilityOne contracts. Therefore, rather than using the purchasing power of the Federal government to stimulate a partnership with business to create competitive, integrated employment opportunities for individuals with significant disabilities, AbilityOne does not involve the business community and instead contracts with CRPs. Consequently, up to this point, AbilityOne has not been an effective springboard to permanent, integrated competitive employment in the general workforce for individuals who are blind or have significant disabilities.

AbilityOne Does Not Focus on Providing Training and Experience for the Achievement of Competitive Integrated Employment outside the Program

584 NPAs currently are eligible to receive set-aside contracts through the AbilityOne program. None are required to achieve, on an annual or biennial basis, a certain number or percentage of transitions of AbilityOne workers to competitive integrated employment outside of the program in order to maintain their eligibility to receive contracts through in AbilityOne program. According to data provided by the AbilityOne Commission, NPA contractors, who collectively receive over \$2.8 billion in Federal contracts per year, each averaged only forty (40) placements annually of individuals who are blind or have significant disabilities into competitive integrated employment over the last five years.

Ability One Contracts Perpetuate Congregation and Segregation

Because the JWOD Act continues to require 75% of contract hours to be accomplished by individuals who are blind or have significant disabilities, this has led to the segregation and congregation of these individuals. The JWOD Act of 1971 and its predecessor, the Wagner O'Day Act of 1938, historically were strongly rooted in providing employment opportunities in

sheltered workshops for individuals who are blind or significantly disabled.³ Indeed, sheltered workshop employment was long regarded as the only type of work such individuals could engage in. Since mid to late 1970's, however, such workers have proven this and many similar assumptions wrong. Despite this, AbilityOne contracts for products continue to be completed in sheltered workshop settings. According to the Ability One Fiscal Year 2013 report⁴, AbilityOne production contracts account for 24% of all hours worked by individuals who are blind or have significant disabilities. A total of 13,292 individuals – 28% of all individuals working on Ability One contracts - worked over 11.2 million hours on production contracts in sheltered workshop settings.

While AbilityOne contracts for services may provide opportunities to do work outside of sheltered workshops, many AbilityOne service contracts involve individuals with disabilities doing this contract work in enclave or work crew models (also sometimes called group supported employment) and/or separated from individuals without disabilities – either because they are completing the service contracts in separate work areas or at times when other employees at the location are not working. AbilityOne service contracts account for 76% of all hours worked by individuals who are blind or have significant disabilities. A total of 35,524 individuals – 72% of all individuals working on Ability One contracts - worked over 36.4 million hours on service contracts.

Programs that lead to the segregation and congregation of people with disabilities instead of providing them opportunities for competitive integrated employment are inconsistent with the goals of Title II of the Americans with Disabilities Act and the US Supreme Court's 1999 decision in *Olmstead v. L.C.*

AbilityOne Participates in the Continued Use of 14(c) Subminimum Wage Certificate Program

According to the Deputy Executive Director of AbilityOne, who addressed the Marketplace Subcommittee, 428 of the 500 Source America NPAs currently hold FLSA Section 14(c) certificates. According to the President and CEO of National Industries for the Blind (NIB), many NPAs associated with NIB have never utilized special minimum wage certificates. All but two (2) of those that had in the past have discontinued the practice. The two (2) NPAs associated

³ <http://www.presidency.ucsb.edu/ws/index.php?pid=36033>

⁴ AbilityOne Fiscal Year 2013 Report. See: http://www.abilityone.gov/media_room/documents/AbilityOne_AR_Pages_final_508_Repl_coverV3.pdf

with NIB that still use a 14(c) certificate employ a total of 57 individuals with disabilities at sub minimum wages. Ten additional NIB NPAs still hold 14(c) certificates but are not using them.

In FY2014, 4,426 (9.4%) out of 46,621 individuals with disabilities working on AbilityOne contracts were paid subminimum wages under Section 14(c) certificates held by the participating NPAs. Data suggests there may also be a strong correlation between being paid subminimum wage and working very low hours. According to the Fiscal Year 2014 AbilityOne report, 90% of individual paid subminimum wage worked less than 9 hours a week. The number of work hours may be artificially limited based on a misunderstanding regarding work incentives associated with Social Security disability benefits received under SSI or SSDI, or a focus on maintaining rather than reducing individuals' reliance on other public subsidies.

AbilityOne Program Based on Requirement that Participants are Deemed Incapable of Competitive Integrated Employment

To be eligible to work on an AbilityOne contract, an individual with a disability must be legally blind or must have a physical or mental disability that "constitutes a substantial handicap to employment and is of such a nature as to prevent the individual under such disability from currently engaging in normal competitive employment." The determination of an individual's inability to engage in competitive integrated employment in the general workforce (referred to as "normal" competitive employment in statute) is delegated to the NPA and does not require any evidence of unsuccessful, good faith effort to secure competitive employment in the general workforce for the individual. Indeed, for an NPA focused on assuring that a sufficient number of eligible individuals who are blind or have other significant disabilities are available to perform at least 75% of the work hours on AbilityOne contracts, there may be little incentive to recognize - and help individuals realize - their potential to work in competitive integrated employment. The AbilityOne program currently does not include sufficient requirements to ensure that competitive, integrated employment is truly not possible as a condition of participation in AbilityOne, and more particularly as a condition of on-going participation in Ability One, nor does the AbilityOne program currently encourage and reward an NPA for assisting individuals otherwise eligible for AbilityOne to obtain competitive integrated employment outside of the NPA.

Additional Conflicts of Interest for NPAs Participating in AbilityOne Program

Currently, in addition to NPAs being given authority to decide whether an individual is incapable of engaging in "normal competitive employment," NPAs are also given authority to determine the individual's productivity level for the purposes of paying a subminimum wage for work performed on AbilityOne contracts. There is limited oversight of the methods and procedures used by NPAs to make the determination of the individual's productivity. That results in an

inherent conflict of interest. The NPA makes decisions regarding whether an individual should be paid a subminimum wage even though the NPA is the entity that stands to benefit financially from the payment of subminimum wages. As a result, the program has been subject to instances of abuse.⁵

AbilityOne Commission Functions Are Not Well Aligned with Ensuring Effective Oversight of the Program in relation to Modern Federal Disability Policy

The AbilityOne Commission was not designed to ensure that the AbilityOne program is well aligned with, and supportive of, Federal disability policy as it has evolved over time. The Commission relies on its Federal agency members for their procurement expertise. While this is consistent with the legislative history of the JWOD Act, it now means that the Commission is not designed to function as an effective oversight body directed to Federal policy of the 21st Century. Additionally, AbilityOne is not currently monitored by any Office of the Inspector General.

Preliminary Recommendations for Consideration by the Full ACICIEID Committee:

1. Congress should amend the JWOD Act to:
 - a. Fully align the Act with modern Federal disability policy goals, including those enshrined in the Americans with Disabilities Act;
 - b. Clearly establish competitive, integrated employment, in the mainstream workforce as the expected and priority outcome of the AbilityOne program so that individuals who are blind or have significant disabilities may receive the supports they need to enter into competitive employment within their communities;
 - c. Ensure all AbilityOne Program contract work is accomplished in fully integrated work settings where individuals with disabilities work, on an individualized basis, alongside of their non-disabled peers;
 - d. Ensure the Federal government's purchasing power is used to effectively engage all Federal contractors in creating competitive integrated employment opportunities for job seekers and workers who are blind or have significant disabilities;
 - e. Establish new definition of what constitutes a disability that makes an individual eligible for work on AbilityOne contracts, with changes made to ensure that:

⁵ For example, 2012 case involving National Center for the Employment of the Disabled (NCED). See <http://www.fbi.gov/elpaso/press-releases/2011/ep021711.htm> and <http://www.kvia.com/539342>

- i. The requirement that a person eligible for AbilityOne must have a disability that “prevents the individual from currently engaging in normal competitive employment” is eliminated; and
 - ii. NPAs are not given discretion to determine who is and is not qualified to work on Ability One contracts.
2. The ACICIEID should consider, and make recommendations in its final report, regarding what changes may be needed to the structure, make up and role of the Ability One Commission in order to ensure that the program is well aligned with, and fully supportive of, Federal disability policy in general, and employment policy in particular, as it evolves over time.
3. An Executive Order should be developed and issued that will expeditiously outline a plan to phase-out the use of FLSA Section 14(c) certificates within the AbilityOne program. As part of this Executive Order:
 - a. All AbilityOne NPAs, who currently employ workers at subminimum wage on AbilityOne contracts, must be required to develop a plan that addresses the expectation to retain those workers at no less hours than they are currently working and to be paid at least Federal minimum wage; and
 - b. The Ability One Commission should be expected to develop a collaborative initiative with the Social Security Administration, the Rehabilitation Services Administration, and the Centers for Medicare and Medicaid Services to ensure the provision of work incentives benefits analysis and counseling to all AbilityOne workers directly impacted by the phase out of subminimum wage in the AbilityOne Program so that the full benefits of earning minimum wage accrue to every individual.
4. Congress should appropriate funding to provide for an Inspector General to be assigned to work directly on-site with the AbilityOne Program.
5. The Department of Education Rehabilitation Services Administration (RSA) should update and reissue guidance to state VR programs clarifying those AbilityOne placements shall not be considered competitive integrated employment unless all criteria for what constitutes a competitive wage and an integrated setting are met. It should be noted that enclaves or work crews (regardless of size, wage and benefits provided to workers) do not meet RSA’s standards for competitive integrated employment.
6. The Ability One Commission, in collaboration with the Rehabilitation Services Administration and ODEP, should update JWOD regulations to require all NPAs participating in the AbilityOne program to:
 - a. Provide highly qualified staff that are certified through one or more nationally recognized credentialing bodies to assist in the placement of individuals working under the AbilityOne Program, and those who have been determined eligible for AbilityOne, into competitive integrated employment;

- b. Maintain contracts as qualified vendors of competitive integrated employment services purchased by the state vocational rehabilitation program and the local Workforce Development Boards.
 - c. Achieve, on an annual basis, a certain number or percentage of transitions of AbilityOne workers to competitive integrated employment outside of the program - in order to maintain their eligibility to receive contracts through the AbilityOne program - so the program functions as a springboard to competitive integrated employment in the general workforce and can, over time, benefit many more individuals who are blind or have significant disabilities; and
 - d. Demonstrate on an annual basis, a certain minimum retention percentage among AbilityOne workers transitioned to competitive integrated employment, as evidenced by data from NPAs following-up with all AbilityOne workers transitioned into competitive integrated employment and their employers on a quarterly basis after placements have occurred to confirm:
 - i. Retention
 - ii. The skillsets and performance of the workers continue to be well-matched with employers' needs and expectations
 - iii. The worker is satisfied with his/her job.
7. The AbilityOne Commission should implement the following through sub-regulatory guidance or as necessary, through regulation:
- a. For Central Nonprofit Agencies (CNAs), sub-regulatory guidance or regulation that ensures the AbilityOne Commission assumes a stronger role in oversight of CNAs, including their processes and procedures, including but not limited to:
 - i. Requiring CNAs to invest a certain percentage of revenues received from administrative fees in the AbilityOne program on providing training and technical assistance to NPAs about effective practices for helping people with significant disabilities achieve competitive, integrated employment;
 - ii. Requiring the collection and annual reporting of data on placement rates of workers with disabilities on AbilityOne contracts (wages, hours, and type of setting);
 - iii. Requiring CNAs to meet specific governance standards as articulated in the 2004 draft Notice of Proposed Rule Making issued by the AbilityOne Commission.
 - b. For Non-Profit Affiliates (NPAs), sub-regulatory guidance or regulation that:
 - i. Requires the annual reporting of data on:
 - 1. Number of individuals on AbilityOne contracts that are eligible for/receiving any of the following: IDEA-funded transition supports; Vocational Rehabilitation-funded employment supports; Medicaid Home and Community-Based waiver-funded services;

2. Wages, hours worked and type of setting (e.g. integrated; group supported employment; or facility-based) for workers with disabilities employed on AbilityOne contracts;
 3. Types of services offered, number served and funds expended in the provision of services to AbilityOne employees with disabilities to assist them in transitioning from AbilityOne work to competitive integrated employment.
- ii. Requires establishment of conflict-of-interest policies to delineate the role of an NPA as an AbilityOne contractor from the same entity's role as a community-rehabilitation provider that is required to provide supports *in the most integrated setting* to clients receiving Federally-funded services;
 - iii. Requires documented assurances that prior to hiring an eligible individual onto an AbilityOne contract, the NPA has:
 1. Assisted the individual to apply for Vocational Rehabilitation services; and
 2. If the individual is determined eligible for VR services, the NPA has committed to providing services, funded by VR, to enable the individual to obtain competitive integrated employment in the broader community if the individual selects the NPA as his/her provider; or
 3. If the individual is determined ineligible for VR services, the NPA has further determined if the individual is enrolled in a Medicaid Home and Community-Based Services (HCBS) program and eligible for services under this program that can be used to obtain and maintain competitive integrated employment (e.g. supported employment services) and, if so, the NPA has, in partnership with the individual, sought authorization from the Medicaid HCBS program for these services and the NPA has further committed to providing these services, funded by the HCBS program, if the individual selects the NPA as his/her provider.
 - iv. Requires the NPA to meet specific governance standards as articulated in the 2004 draft Notice of Proposed Rule Making issued by the Ability One Commission
 - v. Requires the NPA to engage in the Quality Workplace Environment (QWE) initiative at AbilityOne and will finalize a plan and take action as a result within two years of signing up for QWE. For those NPAs that have already signed up to be involved in the QWE they will be considered in compliance if their participation results in a plan, action is taken within two years.