Written Statement for the Record
Advisory Committee on Increasing Competitive Integrated Employment for Individuals With Disabilities
Meeting: March 23-24, 2015
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Introduction

As presented at the last meeting of the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, the National Federation of the Blind is firm in our position that Section 14(c) of the Fair Labor Standards Act needs to be phased out. Many states are taking steps to phase out the use of special wage certificates, but since Section 14(c) is a provision of federal law, it is imperative that states' piecemeal efforts be solidified through an official phase out at the federal level. One disabled American being paid subminimum wages is one too many—with the proper training and support any person with a disability can obtain a job at the minimum wage. Moreover, federal enforcement of Section 14(c) is at best ineffective and at worst impossible because of the underlying flaws of the provision.

This statement will a) outline the steps states are taking to phase out the payment of subminimum wages to employees with disabilities; and b) explain why enforcement of Section 14(c) has lagged and elaborate on why simply increasing enforcement efforts will not be enough to ensure American employees with disabilities are being treated with the dignity and respect we deserve.

Steps States Are Taking to Phase Out Subminimum Wages for Employees with Disabilities

New Hampshire, Vermont, California, Washington, and New York have all taken action to ensure that integrated and competitive employment is favored over sheltered employment. These steps include legislative action, gubernatorial authority, and executive departments banding together to achieve a common goal.

New Hampshire

In May 2014, the New Hampshire legislature passed H.B. 1174, an act that established a committee to study the status of subminimum wage payments to persons with disabilities in the state, identify state practices surrounding such payments, and recommend changes to New Hampshire laws and rules (Muns, 2014). When the bill was passed, technically there were no 14(c)-certificate-holding entities in the state of New Hampshire because by March 31, 2014, all three 14(c) certificates that had been issued to entities in the state had expired (Wage and Hour Division, 2013). When the Committee to Study the Payment of Subminimum Wages to Persons

with Disabilities established under H.B. 1174 met in 2014, it was discovered that all three of these 14(c)-certificate-holding entities were paying all of their employees the minimum wage or more and had no intention of renewing their certificates (See Appendix A).

Finding number one of H.B. 1174 stated: “The state of New Hampshire is committed to ensuring that all workers earn at least the state minimum wage” (Muns, 2014). The only way to ensure that “all workers earn at least the state minimum wage” is to repeal Section 14(c).

The Committee to Study the Payment of Subminimum Wages to Persons with Disabilities released a final report in September 2014, which recommended the repeal of the state laws that allowed entities to pay people with disabilities subminimum wages. As of March 2015, two bills are being considered by the New Hampshire legislature based on this recommendation: S.B. 47 and H.B. 411. If passed, these bills will ensure people with disabilities are paid at least the state minimum wage. So far, no opposition has been voiced, and on March 5, 2015, S.B. 47 passed the New Hampshire Senate with a vote of 24 to 0.

Vermont

In 2002, Vermont closed its final sheltered workshop. The trajectory for accomplishing this transition involved first setting a common goal, then collaborating with providers, gradually phasing out funding, and finally cutting all government support for sheltered workshops (Sulewski, 2007). Specifically, the state Division of Disability and Aging Services, the state Division of Vocational Rehabilitation, the University of Vermont, and Champlain Vocational Services (the last agency in Vermont to hold a Section 14(c) certificate) identified this transition as a mutual goal and then worked together to make it happen.

Vermont has not only ensured that no individuals with disabilities are being paid subminimum wages, but the state also has one of the highest integrated and competitive employment rates for people with developmental disabilities at 38% (Stockton, 2014). This statistic proves that providers, vocational rehabilitation consolers, and employers are more likely to find competitive, integrated employment opportunities for people with disabilities when sheltered subminimum wage employment is not an option and puts to rest the myth that phasing out Section 14(c) causes workers with disabilities to lose employment opportunities.

Vermont serves as a proven model for how to systemically transition subminimum wage workshops to community based employers where all employees are paid the minimum wage or more, but the state took it one step further. Resources are available for current 14(c)-certificate-holding entities outside the state that are interested in transitioning in a seminar called the “Vermont Conversion Institute.” This mentorship illustrates that transition is more than possible; it is at our fingertips.

California

Just as in Vermont, state agencies in California have identified a common goal of improving employment outcomes for people with disabilities and are collaborating to put it into action. The California Departments of Education, Developmental Services, and Rehabilitation signed a

Memorandum of Understanding (MOU) agreeing that "opportunities for integrated, competitive employment shall be given the highest priority for working age individuals with intellectual and developmental disabilities regardless of the severity of their disabilities" (p. 1, See Appendix B). Signed in December 2014, one of the objectives of the MOU was for the agencies to jointly create a plan to phase out the payment of subminimum wages in state-funded employment. This was a very important place to start because many, if not all, 14(c)-certificate-holding nonprofits utilize federal, state, and/or local funding to support their businesses, meaning government funding often directly or indirectly supports the payment of subminimum wages to workers with disabilities. For example, in an audit of the Tennessee Rehabilitation Center in Paris, Tennessee, it was recorded that 70% of administrative costs were from state/federal funding streams, and the remaining 30% came from county funding (See p. 9, Appendix C). This trend puts the onus on the government, not just the certificate holders, to take an active role in stimulating a transition; the agencies in California understand that they must implement policies of high expectations and invest in business models that produce results before California providers will do the same.

The blueprints called for by the MOU are due out in June 2015.

Washington

While California and New Hampshire are in the infant stages of phasing out the payment of subminimum wages to employees with disabilities, Washington State has been committed to providing integrated employment opportunities for individuals with disabilities for decades (Washington State Department of Social and Health Services, 1992). Five key elements contributed to Washington State adopting policies and procedures that significantly discourage individuals with disabilities from being placed into sheltered workshops and instead encourage integrated employment (Winsor, et. al, 2006). As was the case in Vermont and California, one of these key elements was having a common goal. In Washington's case the goal was to aggressively strengthen the emphasis on integrated employment. The state promoted a culture embedded with the attitude that everyone can work and contribute to their communities. Pilot projects were funded so that new ideas could be tested, and success stories were shared at trainings and networking events for Division of Developmental Disabilities (DDD) staff, providers, individuals with developmental disabilities, their families, lawmakers, and businesses. A noteworthy factor in Washington was that different agencies handled different aspects of individual cases, ensuring that home life and work life are supported by completely separate services. For example, the state DDD staff was responsible for residential services, but employment and day supports fell under county DDD staff, keeping the employment focus at the local level where there is a better chance that jobs will be obtained in the community.

New York

While New Hampshire, Vermont, California and Washington used legislative or agency actions to increase the integrated and competitive employment opportunities for individuals with disabilities, New York used a mix of gubernatorial and agency action to stimulate a transition to integrated and competitive employment. In July 2013, The New York State Office for People with Developmental Disabilities (OPWDD) agreed to end new admissions to sheltered subminimum wage workshops (NYS Office for People with Developmental Disabilities, 2013), and about a year later, OPWDD

released a work plan to eliminate all funding for segregated employment settings within ten years (NYS Office for People with Developmental Disabilities, 2014). Because 40% of individuals with disabilities working in New York sheltered workshops are over fifty-years-old, OPWDD estimates that only 50% of workshop participants will be able to successfully transition to competitive employment over six years. The remaining ten percent (those who do not transition out of workshops or retire) will receive other services such as day habilitation. This action was complimented by an executive order signed by Governor Cuomo in September 2014 establishing the Employment First Commission. The Commission is tasked with creating an Employment First policy which makes competitive, integrated employment the first option when considering supports and services for people with disabilities, rather than the last option for the lucky few (New York Exec. Order No. 136, 2014). Again, this illustrates that the government recognizes that it has a responsibility to invest in high expectations if the landscape is ever going to change.

Enforcement of Section 14(c)

The United States Department of Labor Wage and Hour Division is charged with enforcing Section 14(c) of the Fair Labor Standards Act. The Division has adopted regulations to, presumably, ensure that Section 14(c) is given proper oversight, but these regulations are inherently flawed and near impossible to successfully administer. Enforcement takes many forms including investigations of 14(c)-certificate-holding entities on site, processing and noticing red flags in applications in Chicago, and even self-enforcement by the entities themselves. This section will show the deficits in this enforcement and show that the only way to ensure annual time trials are administered fairly is to interview all employees paid under Section 14(c) for the purposes of checking if every rule is being properly followed. This section will conclude by suggesting the Committee recommend this undertaking, but we concede that it is impractical. Not only would it require a lot of manpower and money, it shows that enforcement of Section 14(c) will likely never be adequately executed.

Enforcement of Section 14(c) in the Field

29 CFR §525.1(b) requires employers of people with disabilities under Section 14(c) to review the wages of all employees at least annually to reflect changes in the prevailing wages paid to experienced individuals not disabled, and 29 CFR §525.16 requires that employers keep records that document the productivity of each worker as gathered on a continuing basis or at periodic intervals, among other items. Both of these requirements put significant responsibility on the employer to monitor itself, a responsibility that can only be policed if each entity is evaluated annually. With 750 Wage and Hour field officers (Department of Labor, 2010), sheer math shows that field officers are unlikely to notice, report, and address all problems in this area. This probability is reduced more when we consider that, investigating 14(c)-certificate-holding entities' paperwork and practices are not the only task slated to Wage and Hour Division field officers. Unfortunately, these employees have many other entities to investigate besides 14(c)-certificate-holding entities, and they are tasked with investigating compliance with many other laws besides the Fair Labor Standards Act. As a result, too many 14(c)-certificate-holding entities are not investigated, not held accountable, and not compliant.

One entity that was overdue for an investigation was Henry's Turkey Service. This for-profit entity lapsed on renewing its Section 14(c) certificate and exploited sixty developmentally disabled men. The job of these men was one of the most undesirable tasks imaginable—slaughtering and gutting turkeys. These sixty men were compensated a mere sixty-five dollars per month for their labor while their employer docked hundreds of dollars per month from their paychecks in order to pay for required rent of a bug-infested bunkhouse (Barry, 2014).

Enforcement of Section 14(c) in Chicago

As of 2009, there were only three Wage and Hour staff dedicated to processing new and renewed Applications for Authority to Employ Workers with Disabilities at Special Minimum Wages for 2,500 plus 14(c)-certificate-holding entities (National Disability Rights Network, 2011). This means that each individual is in charge of processing and reviewing over 800 entities per year.

It seems reasonable to believe that part of these three employees' responsibility is to keep an updated list of 14(c)-certificate-holding entities, but with such a large workload, errors are far too frequent. For example, in 2011, the Chicago Lighthouse wrote an open letter to All Community Service Providers Holding a Special Wage Certificate explaining that they relinquished their Section 14(c) certificate (See Appendix D). However, according to the Wage and Hour Division website, the Chicago Lighthouse still has a special wage certificate even though they have been paying all of their employees the minimum wage or more for over thirty years (Wage and Hour Division, 2013). Additionally, even though special wage certificates for nonprofits expire every two years, and such a list of certificate holders should be kept up to date monthly, the list on the Wage and Hour Division's website, as of March 2015, had not been updated since November 2013. Who knows how many new applications have been filed, how many certificates have expired, or, as in the case of the Chicago Lighthouse, how many entities have requested to be taken off the list but have not been so yet? If the Wage and Hour Division does not have the bandwidth to keep a list up to date, what else is being overlooked?

Self-Enforcement by Employers

According to Section 14(c)(2)(B) of the Fair Labor Standards Act and the regulations cited above, employers must adjust wages of people with disabilities employed under Section 14(c) at least annually. These rules are supposedly in place so employers can give regular and thoughtful re-evaluations of each worker's abilities. But simply having the Section 14(c) entities turn in paperwork would not be sufficient to truly measure if the regulations are appropriately carried out. 29 CFR §525.12 (h)(2)(i) states:

> The persons observed should be given time to practice the work to be performed in order to provide them with an opportunity to overcome the initial learning curve. The persons observed shall be trained to use the specific work method and tools which are available to workers with disabilities employed under special minimum wage certificates.

This means that a Section 14(c) evaluator, in theory, must ask each person with a disability if they were given sufficient time to learn the skill they were supposed to perform. The evaluators must also make sure that the individuals with disabilities were provided with appropriate

accommodations during their time trial, meaning each evaluator needs some insight into what accommodations each kind of disability needs. Most employers and most evaluators do not have this insight, and therefore the time trials are poorly conducted and often make the person less productive, thereby resulting in an even lower wage. Is the intended goal of the time trials to reduce wages annually, or thoughtfully reconsider the capabilities of a person with a disability after a year of training?

Harold Leigland, a blind man employed under Section 14(c) in Montana, would likely answer the rhetorical question with the former option. He recently had a time trial test. Prior to the test, he was making $7.61 per hour, but after his time trial, his wage was reduced to $2.75. His new job (at the same employer that was paying him above the federal minimum wage prior to his re-evaluation) required him to sort toys—a task that is almost exclusively visual in nature as many of the toys were unidentifiable by touch alone. A reasonable accommodation may have been labeling the toys by color in Braille, or having Harold move the completed bags to the shelves at the store (or wherever they needed to go next), but instead, Harold is expected to do a near impossible task and gets paid a humiliating wage of $2.75 per hour. If the goal of the time trial re-evaluations is to thoroughly reconsider a subminimum wage, proper accommodations and reasonable expectations need to be in place.

The evaluations of 14(c)-certificate-holding entities need to be done frequently because the nature of work can change frequently, as can the nature of disability. Was a person with a disability given a time trial when they were under the weather or particularly stressed? If this is the case, then their time trial wage is not an accurate reflection of their true potential. The sixty men at Henry's Turkey Service never participated in any time trial tests; month after month, year after year, regardless of how many hours each employee worked, and how many turkeys he slaughtered and gutted, each individual was paid sixty-five dollars per month (Barry, 2014).

Suggested Enforcement: Interviews with Employees Paid Subminimum Wages

In order to ensure that Section 14(c) is properly enforced, each individual being paid under Section 14(c) must be interviewed annually, to obtain information about whether he/she was given the appropriate accommodations and if his/time time trial was assessed fairly by an evaluator who knows how to ask the right questions. This regulation is only truly enforceable if both the evaluator and the employer holds the person with a disability to a high expectation and conducts the evaluation and the annual review with a critical lens. If we assume people with disabilities cannot perform work, we will not question if their performance was affected by accommodations or if the nature of their disability has changed their skillset. If we assume people with disabilities have limited capabilities, we will not question if they were given "opportunity to overcome the initial learning curve" because we will think that curve is too significant to overcome, and if we assume employers are acting in good faith, we will not question if they gave an appropriate amount of training before conducting the test. These are the very assumptions embedded into Section 14(c), and therefore implementing regulations that call for someone to overcome these assumptions and go on the offensive is nearly impossible to achieve.

In some cases, these low expectations mean that employed people with disabilities are literally paid zero cents per hour. Opportunity Village employs over six hundred individuals with disabilities

under Section 14(c), but almost one third of these employees are paid $0.00 per hour (See Appendix E). When expectations are set low, as they undoubtedly are at Opportunity Village, employees are going to meet the expectations. Has any Wage and Hour Division employee evaluated Opportunity Village, asking “were employees given reasonable accommodations?” Or, “did their jobs match their existing skillsets and talents?” When wages are $0.00, clearly there was no effort made to help these individuals reach their full potential, and because Opportunity Village still possesses a certificate, clearly there is not adequate oversight to ensure that effort will be made.

Summary

When a 14(c)-certificate-holding entity is evaluated, the audit is not solely to ensure that Section 14(c) is being enforced accurately, but that all matters related to the Fair Labor Standards Act are being enforced including the minimum wage, overtime pay, and Family Medical Leave Act policies, just to name a few. With so many provisions to enforce, it is unrealistic to expect that each evaluator will be knowledgeable about disabilities and the true potential people with disabilities can exhibit when given the proper training and support. This is especially disconcerting because Section 14(c) was written in 1938, a time when attitudes toward people with disabilities were significantly different than they are today. The laws and regulations automatically assume that people with disabilities are less capable than non-disabled colleagues. To erase this bias entirely from evaluators is impossible.

Based on monetary constraints, bandwidth and statutory bias towards unproductivity, effectively and fairly enforcing Section 14(c) is an impossible task. As stated at the beginning of this statement, Section 14(c) needs to be responsibly phased out.

Conclusion

Every employee deserves a fair wage for the work he/she does, but Section 14(c) prevents people with disabilities from having the opportunity to earn this fair wage. As example after example illustrates (Tennessee Rehabilitation Center, Henry’s Turkey Service, Opportunity Village, etc.), people with disabilities are not held to high expectations. States are trying to do the right thing–in New Hampshire there is legislation that, if passed, will override Section 14(c) of the Fair Labor Standards Act and not allow entities to pay people with disabilities subminimum wages. But all fifty states should not have to go through the lengthy process of changing state laws before the federal government takes the initiative to repeal Section 14(c) altogether.

The Wage and Hour Division’s enforcement efforts are simply not enough, and no amount of reform of enforcement can sufficiently repair the problem. The subminimum wage provision promotes discrimination and exploitation; there are people who are paid $0.00. There is not enough manpower to comb through all of the paperwork and conduct all of the necessary investigations and interviews to ensure no person with a disability employed under Section 14(c) is being exploited. Simply put: Section 14(c) needs to be responsibly phased out so people with disabilities can have the opportunity to be paid the fair wage they are capable of earning.

List of Appendices

Works Cited

Barry, Dan. “The ‘boys’ in the bunkhouse.” *New York Times*. March 9, 2014. http://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html?_r=0.

“Governor Cuomo signs executive order establishing commission to create Employment First policy for New York.” *New York State: Pressroom*. http://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-establishing-commission-create-employment-first-policy-new.

Department of Labor. “US Labor Secretary sends message to America’s under-paid and under-protected: ‘We Can Help!’.” April 1, 2010. http://www.dol.gov/opa/media/press/whd/WHD20100411.htm

Muns, Christopher. House Bill: 1174: An act establishing a committee to study the payment of subminimum wages to person with disabilities. February 6, 2014. http://gencourt.state.nh.us/legislation/2014/HB1174.html.

National Disability Rights Network. “Segregated and Exploited: A Call to Action! The Failure of the Disability Service System to Provide Quality Work.” January 2011. http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf.

New York Exec. Order No. 136. September 17, 2014. http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/governor_files/documents/EmploymentFirstCommissionExecutiveOrder.pdf

NYS Office for People with Developmental Disabilities. No new enrollments in sheltered employment. June 26, 2013. http://www.lwarc.org/No_new_enrollments_in_Sheltered_Employment_6-26-13.pdf.

NYS Office for People with Developmental Disabilities. New York Plan to Increase Competitive Employment Opportunities for People with Developmental Disabilities, Final Approved Plan. May 1, 2014. http://www.opwdd.ny.gov/opwdd_services_supports/employment_for_people_with_disabilities/draft-plan-increase-employment-opps.

Stockton, Halle. “Vermont closed workshops for people with disabilities; what happened next?” *PublicSource*. Septermber 28, 2014. http://publicsource.org/investigations/vermont-closed-workshops-for-people-with-disabilities-what-happened-next#.VMuT4dLF8fZ.

Sulewski, Jennifer Sullivan. “Shifting resources away from sheltered workshops in Vermont.” *Institute for Community Inclusion.* January 2007. http://www.communityinclusion.org/article.php?article_id=200.

Wage and Hour Division. Community Rehabilitation Programs (CRPs) list. November 1, 2013. Accessed on 2015 March 16 from http://www.dol.gov/whd/specialemployment/CRPlist.htm.

Washington State Department of Social and Health Services, Division of Developmental Disabilities. *County Guidelines.* July 1992. https://www.dshs.wa.gov/sites/default/files/DDA/dda/documents/c_guidelines.pdf

Winsor, Jean; Hall, Allison; Butterworth, John & Gilmore, Dana. “Pushing the integrated employment agenda: Case study research in Washington State.” *Institute for Community Inclusion.* June 2006. https://www.communityinclusion.org/article.php?article_id=173.