

Subminimum Wages for People with Disabilities



**South Carolina Advisory Committee
U.S. Commission on Civil Rights**

April 2021

Letter of Transmittal

South Carolina Advisory Committee to
the U.S. Commission on Civil Rights

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The South Carolina Advisory Committee, as part of its responsibility to advise the Commission on civil rights issues within the state, submits this report, “Subminimum Wages for People with Disabilities.” The report was unanimously approved by the Advisory Committee on April 21, 2021.

Sincerely,

Ted Darid Mauro, *Chairperson*

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EXECUTIVE SUMMARY

On March 5, 2020, the South Carolina Advisory Committee (Committee) to the U.S. Commission on Civil Rights (Commission) approved a proposal to examine subminimum wages in South Carolina. The objective of the study was to investigate the civil rights implications of paying people less than minimum wage based on their disability status. The Committee sought to understand if wages paid to these employees are commensurate with the law, if they gain marketable skills, and if they are assisted in transitioning to competitive employment.

This topic falls within the Committee's jurisdiction as it concerns a specific program authorized under federal law, specifically Section 14(c) of Fair Labor Standards Act.¹ In addition, the Americans with Disabilities Act protects persons with disabilities from discrimination in the workplace. Other federal statutes concerning the topic of study include the Workforce Innovation and Opportunity Act. Under Section 14(c) of the Fair Labor Standards Act, persons with various physical or mental disabilities (or persons who have vision impairment or are blind) can be employed at rates below the otherwise applicable federal minimum wage. Under certificates issued by the Secretary of Labor, their wages are set at a level commensurate with their productivity and reflective of rates found to be prevailing in the locality for essentially the same type, quality, and quantity of work. For these workers, under current law, there is no other statutory wage rate.

The origins of Section 14(c) treatment of persons with disabilities go back at least to the National Industrial Recovery Act² of 1933. Under this Act, a productivity-based sub-minimum wage, arranged through a system of certificates, was established for persons with disabilities. In competitive industry, such workers were payable at 75 percent of the industry minimum. In what are known as sheltered workshops, there was no wage floor. The NIRA was declared unconstitutional in 1935.³

The Committee held briefings to hear from elected officials, government officials, advocates, and impacted individuals. The Committee learned that Section 14(c) no longer satisfies the legislative goals of the Act nor meets the needs of people with disabilities to receive supports necessary to become ready for employment in the competitive economy. People with disabilities who are currently earning subminimum wages under the 14(c) program are not categorically different in level of disability from people with intellectual and developmental disabilities currently working in competitive integrated employment.

The Committee unanimously concludes that the South Carolina General Assembly should eliminate the use of Section 14(c). Although the Act may have been well-intentioned, the continuance is unconscionable and is a disservice to the very people it was originally intended to serve.

¹ 29 U.S.C. § 214(c) (1989).

² Pub. L. 73-67 (1933).

³ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

CHAPTER 1: BACKGROUND

Legislative History and Provisions of Section 14(c)

In 1938, Congress enacted the Fair Labor Standards Act (Labor Act) to continue President Franklin Roosevelt's New Deal-era package of programs designed to engage more Americans in the workforce. The Labor Act transformed employment in the United States, setting a national minimum wage for the first time, capping the number of hours employers could force employees to work per week without overtime pay, and imposing standards for child labor.⁴ Section 14(c) of the Labor Act created an exception for the new wage requirement by allowing certified employers to employ workers with disabilities at an hourly wage below the federal minimum wage.⁵ After passage of the Labor Act, thousands of employers set up sheltered workshops employing individuals with disabilities in work environments set apart from the non-disabled workforce.⁶ According to Curtis Decker, the Executive Director of the National Disability Rights Network, these sheltered workshops were originally conceived of as a place where people "could get trained, be protected and learn some skills," but over 80 years after the passage of the Act, "people in these segregated workshops [are] not moving out, not getting into competitive employment, and making well below the minimum wage."⁷ While some evidence suggests that it was originally conceived after World War I as a program to employ veterans with physical disabilities,⁸ the 14(c) program is now mainly used to employ people (including non-veterans) with intellectual and developmental disabilities.⁹

The statutory language of the Fair Labor Standards Act sets the federal minimum wage.¹⁰ The Labor Act permits the certificate-based payment of a subminimum wage for some messengers, apprentices and students (temporary statuses), and persons whose earning or productive capacity

⁴ Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, Pub. L. c. 676, 52 Stat. 1068 (1938); Jonathan Grossman, "Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage" *Monthly Labor Review* 101, no. 6 (1978): 22-30, Accessed January 27, 2020, www.jstor.org/stable/41840777.

⁵ 29 U.S.C. § 214(c).

⁶ Matthew Crawford and Joshua Goodman, *Below the Minimum Wage: A Critical Review of the 14(c) Wage Program for Employees with Disabilities*, 30 HOFSTRA LAB. AND EMPLOYMENT L. J. 591, 595 (2013), <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1556&context=hlelj> (citing William G. Whittaker, Cong. Research Serv., RL 30674, *Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act* 2, 7 (2005)).

⁷ Cheryl Corley, *Subminimum Wages for the Disabled: Godsend or Exploitation?* NPR (April 23, 2014) <https://www.npr.org/2014/04/23/305854409/subminimum-wages-for-the-disabled-godsend-or-exploitation>.

⁸ Christensen Statement at 4; *See also*, Cheryl Corley, *Subminimum Wages for the Disabled: Godsend or Exploitation?* NPR (April 23, 2014) <https://www.npr.org/2014/04/23/305854409/subminimum-wages-for-the-disabled-godsend-or-exploitation>.

⁹ John Butterworth, Director of Employment Systems Change and Evaluation Senior Research Fellow, Institute for Community Inclusion, University of Massachusetts Boston, Testimony, Briefing Before the U.S. Comm'n on Civil Rights, Washington, DC, Nov. 15, 2019, transcript, p 90 (hereinafter cited as "Subminimum Wages Briefing").

¹⁰ 29 U.S.C. § 206(a)(1) (2016).

is impaired by a physical or mental disability (the disability may be a lifelong individual characteristic).¹¹ Section 14(c) of the Labor Act includes some minimal protections. The statute only permits the Secretary of Labor to issue certificates to certain employers and allows those employers to pay below the federal minimum wage “to the extent necessary to prevent curtailment of opportunities for employment.”¹² Also, any worker earning a subminimum wage is entitled to overtime pay consistent with the provisions of the Fair Labor Standards Act.¹³ And in 2016, the Wage and Hour Division issued an official interpretation that while Section 14(c) of the Labor Act permits wages below the federal minimum wage, individual states may set higher wages.¹⁴

Section 14(c) defines a person who may be paid subminimum wages as “an individual whose earning or productive capacity is impaired by a physical or mental disability, including those relating to age or injury for the work to be performed.”¹⁵ To administer the 14(c) certificate program, the Labor Act authorizes the Secretary of Labor to promulgate regulations governing the issuance and Wage and Hour Division monitoring and oversight of 14(c) certificate holders.¹⁶ Notably, 14(c) regulations provide that “the determination of an employment relationship does not depend upon the level of performance or whether the work is of some therapeutic benefit.”¹⁷ There are also a number of employer requirements about wage determination, discussed below.¹⁸

The Secretary of Labor has delegated administration and enforcement of the 14(c) certificate program to the Wage and Hour Division of the Department of Labor.¹⁹ The Wage and Hour Division defines itself as “a federal law enforcement agency with the mission to promote and achieve compliance with the labor standards that protect and enhance the welfare of workers in the United States.”²⁰

¹¹ 29 U.S.C. § 214(a) (Learners, Apprentices, and Messengers), § 214(b) (Students), § 214(c) (Handicapped workers); *See also*, Finn Gardiner, Testimony, *Subminimum Wages Briefing* pp. 138-40 (explaining how work for subminimum wages reinforces stereotypes of people with disabilities, and how because many people with disabilities are diagnosed at birth, this reinforcement persists throughout the lives of people with disabilities).

¹² 29 U.S.C. § 214(c)(1).

¹³ 29 U.S.C. § 207 (2010); 29 C.F.R. § 525.12(e).

¹⁴ Wage and Hour Division Administrator’s Interpretation No. 2016-2, Effect of state laws prohibiting the payment of subminimum wages to workers with disabilities on the enforcement of Section 14(c) of the Fair Labor Standards Act, (Nov. 17, 2016), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FLSAI2016_2.pdf.

See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 179 (discussion of state initiatives to abolish 14(c)).

¹⁵ 29 U.S.C. § 214(c)(1); 29 C.F.R. § 525.3(d).

¹⁶ 29 U.S.C. § 214(c)(1); *See*, 29 C.F.R. §§ 525.11, 525.13, 525.19 (Department of Labor regulations governing issuance of 14(c) certificates, terms and conditions of certificates, renewal of certificates, and Wage and Hour Division investigations of certificate holders).

¹⁷ 29 C.F.R. § 525.3(g).

¹⁸ *See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 3-4.

¹⁹ Sec’y of Labor’s Order No. 01-2014, Delegation of Authority and Assignment of Responsibility to the Administrator, Wage and Hour Division (Dec. 19, 2014), 79 Fed. Reg. 77,527 (Dec. 24, 2014) <https://www.federalregister.gov/documents/2014/12/24/2014-30224/secretarys-order-01-2014>.

²⁰ Zeigler Testimony, *Subminimum Wages Briefing*, pp. 26-27.

Employer Requirements

Under Section 14(c), employers are permitted to pay a “special minimum wage”²¹ below the statutory federal minimum wage, provided that the employers meet several conditions. An employer must apply for, and be issued, a federal certificate before being allowed to pay a subminimum wage to any employee.²² The certificate covers all workers employed by the employer “provided such workers are in fact disabled for the work they are to perform.”²³ Once the Wage and Hour Division grants a certificate, the employer must also conduct studies to ensure that each employee is being paid a wage commensurate with the employee’s abilities as determined by the employer. Such determinations are made through the use of a verifiable work measurement method or the productivity of experienced non-disabled workers employed in the vicinity on comparable work.²⁴ First, the certificate-holding employer must determine the prevailing wage for the same or similar work that the employee with a disability performs. Then, the employer must calculate the commensurate wage it will pay to the employee based on the prevailing wage.²⁵ The wage must be commensurate with wages paid to workers without disabilities,²⁶ although the wage is calculated based on the individual productivity of the worker with a disability.²⁷ The federal regulations explain this calculation as follows:

For example, the commensurate wage of a worker with a disability who is 75 percent as productive as the average experienced nondisabled worker, taking into consideration the type, quality, and quantity of work the disabled worker, would be set at 75 percent of the wage paid to the nondisabled worker. For purposes of these regulations, a commensurate wage is always a special minimum wage, *i.e.*, a wage below the statutory minimum.²⁸

The employer must evaluate and determine the worker’s productivity within one month of the worker beginning employment.²⁹ The commensurate wage of the employee shall be reviewed “[u]pon completion of not more than six months of employment” and “[t]he worker’s productivity shall then be reviewed and the findings recorded at least every 6 months thereafter.”³⁰ In addition, wages for all employees must be adjusted by the employer at periodic intervals at a minimum of once each year” to reflect changes in the prevailing wage for similar work in the vicinity.³¹ These

²¹ 29 C.F.R. § 525.3(h).

²² 29 C.F.R. §§ 525.7, 525.11.

²³ 29 C.F.R. § 525.12(b).

²⁴ 29 C.F.R. §§ 525.9(a)(3), 525.12(h)(1).

²⁵ 29 U.S.C. § 214(c)(2).

²⁶ 29 U.S.C. § 214(c)(1)(B); 29 C.F.R. § 525.3(i).

²⁷ 29 U.S.C. § 214(c)(1)(C); 29 C.F.R. § 525.12(c).

²⁸ 29 C.F.R. § 525.3(i).

²⁹ 29 C.F.R. § 525.12(j)(2).

³⁰ 29 C.F.R. § 525.12(j)(3).

³¹ 29 C.F.R. § 525.12(f) (“The wages of all workers paid a special minimum wage under this part shall be adjusted by the employer at periodic intervals at a minimum of once a year to reflect changes in the prevailing wages paid to experienced individuals not disabled for the work to be performed employed in the vicinity for essentially the same type of work.”)

requirements were modified by subsequent legislation in 2014, requiring that all 14(c) certificate holders also provide ongoing career counseling and other resources designed to enable employees to attain competitive integrated employment.³²

Types of 14(c) Certificate Holders

The Wage and Hour Division of the Department of Labor issues 14(c) certificates to four types of entities that employ people with disabilities. These are: for-profit business establishments, hospital or residential care facilities, school/work experience programs, and nonprofit community rehabilitation programs. The great majority is in the latter category. A 2015 study found that employees with disabilities worked at 2,820 certificate holders, 89 percent of which were Community Rehabilitation Programs.³³ More recent Wage and Hour Division data illustrate the expansion of Community Rehabilitation Programs, which by January 1, 2020, comprised 93 percent of 14(c) certificate holders, accounting for 96 percent of workers receiving subminimum wages.³⁴ Illinois holds the most Community Rehabilitation Program certificates, with 121 as of January 2020, followed by Missouri and California, with 96 and 95, respectively. An examination in 2018 of the top 50 Community Rehabilitation Programs, selected according to the number of subminimum wage workers employed, found a disproportionately large number of workers are employed by a small number of Community Rehabilitation Programs.³⁵

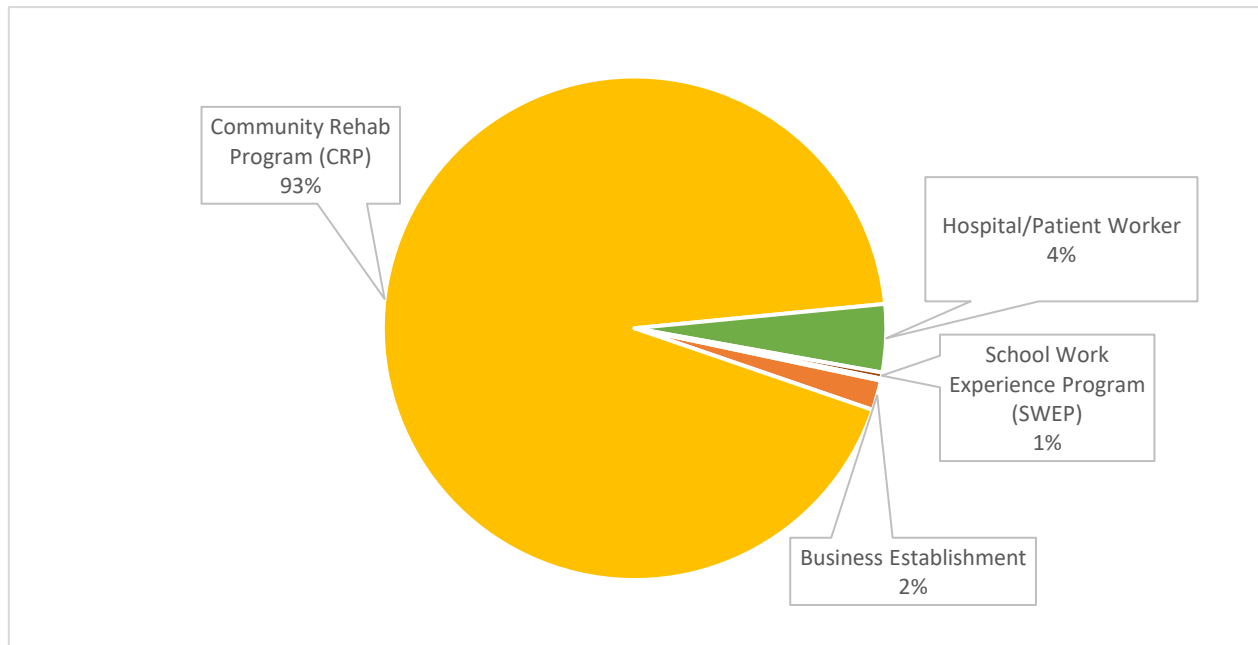
³² See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 32 (discussing the Workforce Innovation and Opportunity Act).

³³ Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at 28 (Sept. 15, 2016).

³⁴ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 105.

³⁵ National Council on Disability, From New Deal to Real Deal: Joining the Industries of the Future, (Oct. 2018) p. 50.

Chart 1.1 Breakdown of 14(c) Certificate Holders



Source: Wage and Hour Division, 14(c) Certificate Holders, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders>; Chart Created by U.S. Commission on Civil Rights

A Community Rehabilitation Program is a program that provides directly or facilitates the provision of vocational rehabilitation services to individuals with disabilities and that provides, singly or in combination, for an individual with a disability to enable the individual to maximize opportunities for employment, including career advancement.³⁶ Under federal law, the government is authorized to make grants to state agencies for vocational rehabilitation services, and these grants support services to help individuals with disabilities prepare for and engage in employment.³⁷ Through a funding formula, federal grants are provided to the states through the Rehabilitation Services Administration of the Department of Education,³⁸ which in order to be received must be matched by the states.³⁹ In FY 2019, the federal government authorized \$3,521,990,000 in grant funding for vocational rehabilitation programs, which are responsible for

³⁶ 29 U.S.C. § 705(4) (2014).

³⁷ Congressional Research Service, Rehabilitation Act: Vocational Rehabilitation State Grants, 2014, p.1.

³⁸ Ibid, p.3.

³⁹ Ibid, p.5.

allocating funds for community rehabilitation programs for persons with disabilities. In FY 2020, the grant program was authorized for \$3,610,040,000.⁴⁰

Vocational rehabilitation services provided for individuals with disabilities include Community Rehabilitation Programs aiming to promote integration into the community and prepare individuals with disabilities for competitive integrated employment, including supported employment and customized employment.⁴¹ These programs may specifically require skills training and job coaching.⁴²

Community Rehabilitation Programs often act as both employers and service providers. As employers who have been granted a 14(c) certificate, they are able to benefit from certain noncompetitive contracts. As service providers, they are able to tap into a multi-billion dollar reservoir of federal and state funds for services for people with disabilities. As the National Council on Disabilities explained in its report, “14(c) employers ... benefit from reduced labor costs by paying subminimum and/or sub-prevailing wages, and often also benefit from these federal and state set-aside contracts, while receiving payments from Medicaid, Vocational Rehabilitation, state, and local funding sources.”⁴³ To fully fund the services they offer, Community Rehabilitation Programs rely on a “braided funding stream”⁴⁴ including three main sources: vocational rehabilitation funding described above, the Medicaid Home and Community-Based Services waiver program, and direct revenue from labor contracts, which for some Community Rehabilitation Programs includes federal contracts awarded through the AbilityOne program.⁴⁵ All three federal programs impose restrictions that reflect a national disability policy that prioritizes competitive integrated employment.⁴⁶

⁴⁰ The majority of community rehabilitation programs which provide supports and services for people with intellectual and developmental disabilities to obtain a job are funded by the vocational rehabilitation system. Under the Rehabilitation Act of 1973, the Department of Education funds grantees that are defined as: “State VR agencies or a consortium of State VR agencies in partnership with other key entities, such as State and local educational agencies, community rehabilitation providers, 2-year and 4-year postsecondary educational institutions (including vocational and technical schools), and employers.” The Department of Education does not offer a line item of funds that go specifically to community rehabilitation providers. See Department of Education, Rehabilitation Services, Fiscal Year 2020 Budget Request, <https://www2.ed.gov/about/overview/budget/budget20/justifications/i-rehab.pdf>.

⁴¹ 29 U.S.C. § 723(b)(2) (2014).

⁴² See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 31-37 (discussing the Rehabilitation Act and the Workforce Opportunity Investment Act).

⁴³ National Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, (Oct. 2018) pp. 55-56.

⁴⁴ National Council on Disability, *Subminimum Wage and Supported Employment*, (Aug. 2012) p. 26.

⁴⁵ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 134-138.

⁴⁶ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 24-25.

Researchers found in 2016 that two-thirds of Community Rehabilitation Programs provided non-work services in addition to employment services.⁴⁷ In 2002–2003, only 18 percent of individuals served by Community Rehabilitation Programs received employment services in integrated settings, compared to 28 percent during 2010–2011, and 38 percent in 2014–2015.⁴⁸ According to researchers at University of Massachusetts’ Institute for Community Inclusion, these increases in integration reflect a national trend in people with disabilities requesting services in an integrated setting, as well as federal policy encouraging Community Rehabilitation Programs to provide services in integrated settings.⁴⁹

The type of work performed at a Community Rehabilitation Program varies widely. It may include packing, collating, and light assembly in a factory setting,⁵⁰ to working at a cotton candy shop.⁵¹ Kitchen and cafeteria work may include rolling silverware in napkins, moving equipment around on carts, washing dishes, and filling table containers with sugar packets.⁵² Community Rehabilitation Programs may even provide a service to translate any military skills to new employment.⁵³ In the public comments received by the Commission, one family member of a person with a disability stated that individuals on a waiting list for a Community Rehabilitation Program have to fill their days watching TV and playing on a tablet, highlighting that without Community Rehabilitation Programs persons with a disability in her state are “wasting away and losing valuable time.”⁵⁴

In contrast to Community Rehabilitation Programs that are 14(c) employers, sites in Vermont have transitioned from subminimum wage employment and utilize funding to provide enhanced services

⁴⁷ Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). *StateData: The national report on employment services and outcomes through 2016*. University of Massachusetts Boston, Institute for Community Inclusion at 4; *See supra* notes 57-61.

⁴⁸ Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). *StateData: The national report on employment services and outcomes through 2016*. University of Massachusetts Boston, Institute for Community Inclusion at 3-4 (the study notes 3 important caveats to this data: These figures include use of enclaves and mobile groups made up of only people with disabilities within integrated settings, Community Rehabilitation Programs provide a higher proportion of individuals with intellectual/developmental disabilities with facility-based non-work services than they do employment services in community settings, and this trend is not corroborated in data on services delivered by state intellectual/developmental disabilities agencies, in which the percentage of individuals receiving integrated employment services has remained relatively level, at 19 percent, since 2010).

⁴⁹ *Ibid.*

⁵⁰ General Assembly Cincinnati, *Production*, <http://generalassemblycincy.com/production/> (last accessed May 26, 2020).

⁵¹ Holy Angels, *Cotton Candy Factory*, <https://www.holyangelsnc.org/cotton-candy-factory> (last accessed May 26, 2020).

⁵² Notes of Amy Royce, Special Assistant to Commissioner Kladney (March 3, 2020); Notes of Maureen Rudolph, General Counsel (March 3, 2020).

⁵³ PRIDE Industries, *Military Jobs at PRIDE*, <https://prideindustries.org/jobs/military-jobs/> (last accessed May 26, 2020).

⁵⁴ Donna Ahola, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

for people with disabilities.⁵⁵ Whether or not they are 14(c) employers, many Community Rehabilitation Programs provide non-work services in addition to employment services, and are under increasing pressure to shift to competitive integrated employment from facility-based work (in facilities or institutions), where there is a risk of isolation or institutionalization;⁵⁶ there is also an additional focus on community life engagement.⁵⁷ Non-work services can range from rehabilitation services, day treatment, and training.⁵⁸ More specific examples of non-work services include clinical services (i.e. speech and behavioral therapy), community exploration activities (i.e. computer training, pet therapy, and first aid classes), or performing arts programs.⁵⁹ Additional on-site projects can include rug weaving, paper recycling, and custodial/food service training opportunities,⁶⁰ training in financial management, networking, and using various forms of transportation.⁶¹ In Vermont, the services included networking, researching job opportunities, facilitating career decisions, and other self-determination-focused activities such as advocacy and skills for independent living.⁶² Community Rehabilitation Programs may also provide transportation, an important component for people with disabilities, particularly when accessible public transportation limits employment opportunities,⁶³ and for individuals who are unsure that another job would provide the transportation they require to work.⁶⁴ These funded services should be taken into account when analyzing the economics as well as the effectiveness of 14(c) and other policy options.

⁵⁵ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 183-185 (discussing how a former Community Rehabilitation Program continues to provide services to people with disabilities).

⁵⁶ Even in facility-based settings, the ADA integration mandate requires integration whenever reasonable. See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 19 (discussing the *Olmstead* Supreme Court case and subsequent Department of Justice actions); see also Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 11-13 (discussing the history of policies institutionalizing persons with disabilities).

⁵⁷ Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). StateData: The national report on employment services and outcomes through 2016. University of Massachusetts Boston, Institute for Community Inclusion at 4.

⁵⁸ U.S. Dep’t of Labor Wage and Hour Division, *Fact Sheet #39G: The 2010 National Community Rehabilitation Program Compliance Baseline Survey*, (June 2009) <https://www.dol.gov/agencies/whd/fact-sheets/39g-14c-2010-survey>.

⁵⁹ MVLE, *Support Services*, <https://www.mvle.org/support-services/> (last accessed May 26, 2020).

⁶⁰ Booneville Human Development Center, *Overview*, <https://humanservices.arkansas.gov/about-dhs/ddds/human-development-centers/booneville-hdc> (last accessed May 26, 2020).

⁶¹ Abilities Without Boundaries, *Programs & Services*, <https://abilitieswithoutboundaries.org/programs-services/> (last accessed May 26, 2020).

⁶² See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 183-185.

⁶³ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 165, 200, 204, 206.

⁶⁴ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 165.

Time Trials and Piece Rates

Under the Labor Act, after not more than six months of employment, the 14(c) employer is required to review the quantity and quality of work performed by the worker with a disability as compared to that of a worker who does not have a disability.⁶⁵ 14(c) certificate holders may conduct time studies or time trials as a method to determine the productivity of an individual with a disability.⁶⁶ However, these time studies may only be used to assist in setting that individual's wage.⁶⁷

After the initial evaluation, the wage determination must be periodically reviewed.⁶⁸ According to the Wage and Hour Division's responses to the Commission's interrogatories, conducting reviews in six-month intervals should be viewed as the minimum requirement for certificate holders to remain compliant with the Labor Act Section 14(c), though the employer may conduct reviews more frequently.⁶⁹

Employers may also establish a piece rate for industrial work being performed by workers with disabilities under a 14(c) certificate.⁷⁰ Federal regulation establishes that these piece rates must be:

Based on the standard production rates (number of units an experienced worker not disabled for the work is expected to produce per hour) and the prevailing industry wage rate paid experienced nondisabled workers in the vicinity for essentially the same type and quality of work or for work requiring similar skill. (Prevailing industry wage rate divided by the standard number of units per hour equals the piece rate.).⁷¹

Developments in Civil Rights Protections

Although Congress enacted the post-Civil War Reconstruction Amendments and some prior federal legislation with the intent to protect rights to freedom from discrimination and equal protection under the law, it was not until the Civil Rights Act of 1964 that the federal government had broad authority to investigate civil rights violations and to enforce civil rights laws.⁷² A 1983 Commission report documented the civil rights challenges facing people with disabilities dating

⁶⁵ 29 U.S.C. § 214(c)(2); 29 C.F.R. § 525.12(j)(3).

⁶⁶ 29 C.F.R. § 525.12(h)(2)(i).

⁶⁷ 29 C.F.R. § 525.12(h)(2)(i).

⁶⁸ *Infra* note 31.

⁶⁹ 29 C.F.R. § 525.12(j)(3); Wage and Hour Division Response to USCCR Interrogatory No. 17 at 7.

⁷⁰ 29 C.F.R. § 525.12(h); *See also, Hodgson v. Cactus Craft of Arizona*, 481 F.2d 464, 467 (9th Cir. 1973)

(Minimum wage provisions of 29 U.S.C. § 203 apply to employees paid a piece rate); Wage and Hour Division, *Section 14(c) Online Calculators User Guide*, p. 39,

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/calculatorGuide.pdf> ("A piece rate is the wage paid per each completed unit of work (e.g., a task performed or piece produced). When a worker with a disability is to perform a production job, the simplest and most objective method to ensure the payment of commensurate wages is the payment of a piece rate").

⁷¹ 29 C.F.R. § 525.12(h)(1)(i).

⁷² *See, e.g., U.S. Com'n on Civil Rights, Are Rights a Reality?*, pp. 7-10.

back to pre-Revolutionary America, when “[l]aws in the Thirteen Colonies excluded settlers who could not demonstrate an ability to support themselves independently.”⁷³ People with disabilities have experienced pervasive discrimination over time, including the eugenics movement in the 1920s that irrationally blamed people with disabilities for many societal problems.⁷⁴ The unwarranted and harmful institutionalization of many people with disabilities has its beginnings in discriminatory attitudes about people with disabilities that were widespread in 1920s America.⁷⁵ The Commission found in 1983 that the historical institutionalization of people with disabilities led to their being overlooked by policymakers later in the twentieth century.⁷⁶

The Commission identified 30 civil rights laws that protected people with disabilities as of the 1983 report, recognizing that the most significant legislation had been passed in the 1970s.⁷⁷ Building on concerns identified in the Commission’s 1983 report, in 1986, the National Council on Disability recommended that Congress take further legislative action to expand equal protection laws to people with disabilities, noting that:

A problem with existing laws [regarding discrimination against people with disabilities], however, is that their coverage is not nearly as broad as laws prohibiting discrimination on the basis of race, color, sex, religion, or national origin. Many types of activities, such as employment by agencies engaged in interstate commerce, public accommodations, and housing, are covered by laws prohibiting other types of discrimination, but not by laws prohibiting handicap discrimination.⁷⁸

In 1990 Congress enacted and President Bush signed into law the Americans with Disabilities Act, providing explicit federal civil rights protection in all walks of life to people with disabilities.⁷⁹ It

⁷³ U.S. Comm’n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, p. 18 (1983) <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11081.pdf>.

⁷⁴ *Ibid.*, 19-20.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, 21-22.

⁷⁷ *Ibid.*, 46.

⁷⁸ Nat’l Council on Disability, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities - With Legislative Recommendations*, (Feb. 1986), <https://ncd.gov/publications/1986/February1986#9a> (no page numbers indicated) (To note, the Commission recognizes that referring to people with disabilities as “handicap” is offensive and is only used in this context to remain accurate to the original legislative text of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), which was under discussion by the National Council on Disability).

⁷⁹ In 1983 the Commission published *Accommodating the Spectrum of Individual Abilities* and called for greater federal civil rights protections for people with disabilities. *See*, U.S. Comm’n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, pp. 163-64 (Sept. 1983) <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11081.pdf>; *See also*, U.S. Comm’n on Civil Rights, *U.S. Commission on Civil Rights Celebrates the 25th Anniversary of the Americans with Disabilities Act of 1990* (July 24, 2015) (“The U.S. Commission on Civil Rights is proud to have contributed to the understanding of this important law and of all other federal civil rights laws that are essential to the development and maintenance of a productive citizenry free to choose its own destiny without artificial and discriminatory barriers.”) <https://www.prnewswire.com/news-releases/us-commission-on-civil-rights-celebrates-the-25th-anniversary-of-the-americans-with-disabilities-act-of-1990-300115868.html>.

was not until the 1990s that federal courts invalidated statutes that were facially discriminatory against persons with disabilities. For example, in 1996, the Sixth Circuit held that the anti-discrimination provisions of the federal Fair Housing Act preempted Michigan zoning laws with stricter requirements for the location of adult foster care for persons with disabilities.⁸⁰ The Sixth Circuit reasoned that the Supreme Court had held that a facially discriminatory policy is a form of intentional discrimination, and found that: “By their very terms, these statutes apply only to [adult foster care] facilities which will house the disabled, and not to other living arrangements.”⁸¹ Congressman Bobby Scott (D-VA) testified at the Commission’s briefing that he hopes the type of discrimination he views as inherent in Section 14(c) will end, emphasizing that:

“[P]eople with disabilities should be treated like everybody else. If they can make the minimum wage, if they can get a job, they ought to be able to make the minimum wage.

You ought not to be able to pay them a differentiated wage just because they have a disability. And we found that in most of the people on 14(c) could, perhaps with a little support, make a full minimum wage.”⁸²

In the 1983 report, *Accommodating the Spectrum of Individual Abilities*, the Commission recognized the risk of discrimination that people with disabilities faced when seeking employment, writing that “studies indicate that *only in a tiny percentage of cases* is inability to perform a regular, full-time job the reason” that a person with disabilities “is not employed.”⁸³ Furthermore, the Commission found in 1983 that for workers with disabilities with less than twelve years’ experience, the average wage paid was below the federal minimum wage.⁸⁴ The Commission also recognized the risk of unnecessary institutionalization people with disabilities face when seeking services, finding that even the best-run institutions could not avoid segregation of people with disabilities.⁸⁵ The Commission noted, however, that the recognition that people with disabilities are better served in community settings came with the responsibility to ensure that deinstitutionalization did not result in the elimination of programs without proper replacements for necessary services.⁸⁶

The Commission’s investigation into subminimum wages for people with disabilities builds on the important work of the National Council on Disability, which, like the Commission, is bipartisan by design.⁸⁷ “First established as a small advisory Council within the Department of Education in

⁸⁰ *Larkin v. State of Michigan Dep’t of Social Services*, 89 F.3d 285 (6th Cir. 1996).

⁸¹ *Id.* at 290 (analyzing *International Union, United Auto. Aerospace & Agricultural Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 197-200 (1991)).

⁸² U.S. Representative Robert C. Scott Testimony, *Subminimum Wages Briefing*, p. 21.

⁸³ U.S. Comm’n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* at 29 (1983) <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11081.pdf> (emphasis added).

⁸⁴ *Ibid.*, 31.

⁸⁵ *Ibid.*, 33.

⁸⁶ *Ibid.*, 34-35.

⁸⁷ 29 U.S.C. § 780(a).

1978, [the National Council on Disability] was transformed into an independent agency in 1984 and charged with reviewing all federal disability programs and policies.”⁸⁸ In his written testimony to the Commission, the Council’s current Chair, Neil Romano, wrote that “there isn’t a topic I feel more strongly about than ending subminimum wages for people with disabilities.”⁸⁹ Over the past decade, the Council has published several reports on employment for people with disabilities, including its 2018 report on competitive integrated employment, *National Employment Disability Policy, From the New Deal to the Real Deal: Joining the Industries of the Future*.⁹⁰ The Council’s report recognized the advancements made in protecting the civil rights of people with disabilities, and the work that remains to ensure that all people with disabilities have access to integrated supports and services, as follows:

As a result [of civil rights advances since 1968], today, many young people with disabilities have come of age in an America where they live at home and in their communities, go to school with nondisabled peers, navigate their cities and towns free from the physical and architectural barriers that formerly existed, and hold increasingly higher expectations of themselves and others for a self-determined life in the community.

Despite these significant advancements, however, the country and its public institutions are still grappling with the reality that full inclusion is more than mere physical proximity in the community, *it is also economic*. While thousands of Americans with intellectual and developmental disabilities, blindness, and other disabilities have moved out of segregated residential institutions and now live and attend school in community settings, many such people, nevertheless, still lack access to typical jobs in the mainstream of the economy, or competitive integrated employment, and in turn, the resources and supports that they need to be fully engaged in civic and recreational activities during the hours that they are not working. Many of these same persons can and want to work and contribute as taxpayers and consumers but are restricted from doing so by considerable structural barriers to employment.⁹¹

The payment of subminimum wages to people with disabilities, and the segregated settings in which some people with disabilities earning subminimum wages have been employed, raise federal civil rights concerns. By statutorily permitting less than the federal minimum wage for persons with disabilities, Section 14(c) raises issues under Equal Protection Clause of the Fourteenth Amendment; adopted in 1861, this Amendment guarantees all persons “equal protection of the

⁸⁸ Nat’l Council on Disability, About Us, History of NCD, <https://ncd.gov/about> (accessed April 3, 2020).

⁸⁹ Neil Romano, Chairman, National Council on Disability, Written Statement for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights, Nov. 15, 2019, at 1 (hereinafter “Romano Statement”).

⁹⁰ Nat’l Council on Disability, *National Employment Disability Policy, From the New Deal to the Real Deal: Joining the Industries of the Future* (Oct. 11, 2018) https://ncd.gov/sites/default/files/New_percent20Deal_percent20to_percent20Real_percent20Deal_percent20FINAL_508.PDF.

⁹¹ *Ibid.*, 8-9 (emphasis in original).

laws.”⁹² By paying individuals less than the minimum wage, employers may be infringing upon the amendment’s express purpose of treating all people equally.⁹³ Section 14(c) may also raise legal issues under Title I of the 1990 Americans with Disabilities Act (ADA), which was intended to ensure wide-reaching and comprehensive civil rights protections for individuals with disabilities.⁹⁴ Categorically, under Section 14(c), people with disabilities being paid a subminimum wage are not granted the same protections, nor are they offered the same opportunities that are available to people working at the minimum wage or above. For example, the Commission received testimony from Alison Barkoff, Director of Advocacy at the Center for Public Representation, that employees of 14(c) certificate holders are denied the ability to unionize.⁹⁵ At the same time, proponents of Section 14(c) argue that these differentials allow some of the most vulnerable persons with disabilities to have access to jobs that they would otherwise not have.⁹⁶ Set forth below are the applicable laws and legal arguments for and against the 14(c) program.

The Fourteenth Amendment’s Equal Protection Clause

The Fourteenth Amendment to the U.S. Constitution states, in part, that “no state shall...deny to any person within its jurisdiction the equal protection of the laws.”⁹⁷ It is also applicable to the federal government.⁹⁸ This language would seemingly create a conflict with the established 14(c) program that allows employers to treat individuals with disabilities differently by paying them less than nondisabled individuals. Despite this apparent conflict, claims in federal courts have been challenging. As a former American Bar Association president stated, “[w]hile the 14th Amendment has been used to uphold the rights of women and minorities, it has not proven as effective in the disability rights movement, due mainly to a U.S. Supreme Court ruling more than 30 years ago.”⁹⁹

In 1985, in the formative case on this issue, *City of Cleburne v. Texas, Cleburne Living Center, Inc.*, the Supreme Court declined to find that individuals with intellectual disabilities were a class who were historically subject to discrimination, and therefore the Court only afforded them a lesser

⁹² U.S. CONST. amend. XIV, § 1.

⁹³ Matthew Crawford and Joshua Goodman, *Below the Minimum Wage: A Critical Review of the 14(c) Wage Program for Employees with Disabilities*, 30 HOFSTRA LAB. AND EMPLOYMENT L. J. 591, 600 (2013), <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1556&context=hlelj>

⁹⁴ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 16-17.

⁹⁵ Alison Barkoff, Response to USCCR Follow-Up Question No. 6 at 8.

⁹⁶ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 95-96.

⁹⁷ U.S. CONST. amend. XIV, § 1.

⁹⁸ See e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁹⁹ Linda Klein, “14th Amendment should be used to ensure equal protection for those with disabilities,” ABA Journal, June 27, 2017, https://www.abajournal.com/news/article/14th_amendment_should_be_used_to_ensure_equal_protection_for_those_with_dis.

“rational basis” standard of review under the Equal Protection Clause.¹⁰⁰ In ruling on the case, the Court held that the lower court “erred in holding [individuals with intellectual disabilities comprise] a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation.”¹⁰¹ But the Court also acknowledged: “How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.”¹⁰² Further, the Court stated that its decision was “absent controlling Congressional discretion.”¹⁰³

There is some debate about whether the passage of the ADA in 1990 impacts the holding in *Cleburne*, particularly in light of the following Congressional findings in the ADA:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society[.]¹⁰⁴

A federal court in New York found that this language in the Congressional findings suggested individuals with disabilities “should be deemed a suspect class for purposes of equal protection review.”¹⁰⁵ As noted by the federal district court:

“Several questions arise from Congress' invocation of [the findings section of the ADA, 42 U.S.C. § 12101(a)(7)]. It is unclear what Congress attempted to effect by this language—whether Congress intended to force the courts to subject legislation or behavior respecting disabled persons to strict scrutiny review or whether the Congress merely desired to send a message to the courts that a heightened level of review of the claims of disabled individuals was appropriate.”¹⁰⁶

The Americans With Disabilities Act

Congress passed the ADA in 1990 “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;” “to provide clear, strong,

¹⁰⁰ *City of Cleburne v. Texas, Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

¹⁰¹ *Id.* at 442.

¹⁰² *Id.* at 442-43.

¹⁰³ *Id.* at 439-40.

¹⁰⁴ 42 U.S.C. § 12101(a)(7) (2008).

¹⁰⁵ *Bartlett v. New York State Bd. of Law Examiners*, 970 F. Supp. 1094, 1132 (S.D.N.Y. 1997), *aff'd in relevant part*, 156 F.3d 321, 332 (2d Cir. 1998), *cert. granted, judgment vacated*, 527 U.S. 1031 (1999) (mem.), and *aff'd in relevant part*, 226 F.3d 69, 86 (2d Cir. 2000).

¹⁰⁶ 970 F. Supp. at 1132.

consistent, enforceable standards addressing discrimination against with disabilities;” and “to ensure that the Federal Government plays central role in enforcing the standards established[.]”¹⁰⁷ As the Commission summarized in a 2000 report:

The ADA provides a host of civil rights protections for individuals with disabilities. The law seeks to ensure for people with disabilities rights such as equal opportunity in employment, full accessibility to government services, public accommodations, telecommunications; and meaningful methods of enforcing those rights. These rights were not always provided, but they have evolved over time.¹⁰⁸

The language of the ADA prohibits discrimination against persons with essentially all types of disabilities as well as perceived disabilities, including with respect to employment.¹⁰⁹ The statute defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; *or* being regarded as having such an impairment.”¹¹⁰ Moreover, such discrimination is prohibited in both the public and private sectors,¹¹¹ although there are some heightened requirements for public employers.¹¹²

Relevant to the civil rights analysis of Section 14(c), Title I of the ADA prohibits discrimination in employment, and Title II includes a mandate requiring integration. Title I prohibits discrimination against persons with disabilities in employment, and defines employers as persons engaged in industry affecting commerce with more than 15 employees.¹¹³ The types of prohibited discrimination include “limiting, segregating, or classifying a job applicant or employee in way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;”¹¹⁴ failure to provide a reasonable accommodation unless it would impose an undue hardship on the business;¹¹⁵ and discriminatory testing or qualification standards unless they are job-related for the position in question and consistent with business necessity.¹¹⁶ Discrimination against a “qualified individual” is prohibited, and “qualified individual means an individual who, with or without reasonable accommodation, can perform the

¹⁰⁷ 42 U.S.C. § 12101(b)(1)-(3) (2009).

¹⁰⁸ U.S. Commission on Civil Rights, *Sharing the Dream: Is the ADA Accommodating All?*, Oct. 2000, Ch. 1, at notes 2-7 (citing ADA provisions), <https://www.usccr.gov/pubs/ada/main.htm>.

¹⁰⁹ 42 U.S.C. § 12102(3) (2008).

¹¹⁰ 42 U.S.C. § 12102(1) (2009) (emphasis added).

¹¹¹ See 42 U.S.C. § 12111(2) (2009) (definition of “‘covered entity’ means an employer, employment agency, labor organization, or joint labor-management committee”) and § 12111(5)(A) (definition of employer).

¹¹² The Code of Federal Regulations requires that:

“A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability . . . (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.” 28 C.F.R. § 35.130(b)(1)(vii).

¹¹³ See 42 U.S.C. § 12112 (discrimination prohibited) and § 12111(5) (definition of employer includes persons engaged in commerce with 15 or more employees, with few exceptions such as the United States government).

¹¹⁴ 42 U.S.C. § 12112(b)(1).

¹¹⁵ 42 U.S.C. § 12112(b)(5)(A).

¹¹⁶ 42 U.S.C. § 12112(b)(6).

essential functions of the employment position that such individual holds or desires.”¹¹⁷ However, the statute requires consideration of “the employer’s judgement as to what functions of a job are essential.”¹¹⁸

Title II of the ADA establishes and protects the right of people with disabilities to receive services in the most integrated setting.¹¹⁹ In one class action lawsuit, individuals with disabilities working in a sheltered Community Rehabilitation Program in Oregon challenged a state program that overly relied on segregating people with disabilities in employment settings, resulting in a settlement requiring the state to engage in systematic reforms to reduce the number of people with disabilities working in sheltered workshops.¹²⁰

Integration Mandate

As mentioned, Title II of the ADA includes a mandate that persons with disabilities be integrated, and unlike Title I, it has been applied more directly to 14(c), as there have been some cases in which individuals with disabilities were not working in segregated settings.¹²¹ Title II prohibits discrimination against any qualified person with a disability, as well as the exclusion from or denial of the benefits of services, programs, or activities of a public entity.¹²² The language of Title II prohibiting exclusion or denial is referred to as ADA’s “integration mandate.”¹²³ Under the integration mandate, Title II regulations require public entities to “administer services, programs, and activities in the *most integrated setting appropriate* to the needs of qualified individuals with disabilities.”¹²⁴ Under this language, no specific amount of integration is required; however, integration is required to the fullest extent possible.¹²⁵

Title II prohibits public entities from segregating persons with disabilities either directly or indirectly, through contractual programs, licensing or “other arrangements,” such as program administration or policy choices that have the effect of discriminating against persons with disabilities.¹²⁶ This language may apply to 14(c) workshops because although the rate of Community Rehabilitation Programs¹²⁷ offering integrated employment services has increased in

¹¹⁷ 42 U.S.C. § 12111(8).

¹¹⁸ *Id.*

¹¹⁹ 42 U.S.C. § 12132 (1990).

¹²⁰ *Lane v. Brown*, 166 F.Supp.3d 1180 (D. Or. 2016); *See also*, Settlement Agreement, *Lane v. Brown*, 3:12-cv-00132 (D. Or. 2016).

¹²¹ *See* Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 25.

¹²² 42 U.S.C. § 12132 (1990).

¹²³ *See, e.g., Townsend v. Quasim*, 328 F.3d 511, 515–16 (9th Cir. 2003).

¹²⁴ 28 C.F.R. §35.130(d) (the “integration mandate”) (emphasis added).

¹²⁵ *Id.*

¹²⁶ 28 C.F.R. §35.130(b)(1) and (b)(3).

¹²⁷ Community Rehabilitation Programs are federally-funded programs that provide vocational rehabilitation and employment services for people with disabilities.

recent years, over 90 percent of 14(c) employers are Community Rehabilitation Programs.¹²⁸ Although data shows that there has been a trend towards integration, the Advisory Committee for Increasing Competitive Integrated Employment found as of 2014, three-quarters of people with disabilities receiving employment services through a state intellectual/developmental disabilities agency (through Community Rehabilitation Programs) were receiving services in a “sheltered or facility-based environment.”¹²⁹

In 1999, nearly a decade after the passage of the ADA, in the case of *Olmstead v. L.C.*, the Supreme Court reviewed the ADA’s integration mandate and held that public entities must provide integrated services or programs when they are appropriate, not opposed by affected persons, and can be reasonably accommodated.¹³⁰ The Court also stated that a public entity may be excused from the integration mandate if it would create a “fundamental alteration” of its services.¹³¹ The Court reasoned that:

“Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”¹³²

While *Olmstead* dealt with unnecessarily institutionalizing individuals with psychiatric and intellectual disabilities, finding discrimination on the basis of their disability violated the integration mandate of Title II of the ADA, these principles have been successfully applied to 14(c) workshops in cases involving states’ sheltered workshop systems. Not all 14(c) workplaces are segregated, but if they are, this segregation may pose civil rights issues. As Regina Kline, Partner at Brown, Goldstein & Levy, explained:

“As public employment systems in the majority of states have serially overinvested in sheltered workshops to the exclusion of integrated alternatives like supported employment, many people with disabilities, who can and want to work but need additional services and supports to do so, will continue to be pipelined, referred, or otherwise enrolled in

¹²⁸ See, Wage and Hour Division, *14(c) Certificate Holders*, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders> (last accessed May 29, 2020) (93 percent of 14(c) certificates as of Jan. 2020)..

¹²⁹ Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, *Final Report*, p. 28, (Sept. 15, 2016) https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf.

¹³⁰ *Olmstead v. L.C.*, 527 U.S. 581, 607 (1999).

¹³¹ *Id.* at 604.

¹³² *Id.* at 600-01.

segregated sheltered workshops with little opportunity to make meaningful and informed choices to work elsewhere.”¹³³

Two cases in particular support the concept that if they are segregated, 14(c) workshops may violate the ADA’s integration mandate. In 2013, the U.S. Department of Justice intervened in the case of *Lane v. Brown*, inserting itself as a party in private litigation against the State of Oregon challenging the state’s operation of sheltered workshops. Oregon had been employing thousands of persons with intellectual and developmental disabilities in sheltered workshops, principally in sorting hospital trash, where they earned well below minimum wage—an average of \$3.35/hour and some as little as 44 cents/hour—and they had little interaction with others.¹³⁴ Further, the complaint alleged the state education system was directing at-risk youth towards working in such segregated workshops.¹³⁵ The Department argued that although the plaintiffs didn’t allege risk of institutionalization, as in *Olmstead* “the precepts of *Olmstead* were nevertheless violated.”¹³⁶ According to the Department of Justice, the most integrated setting mandate established under the ADA and *Olmstead*, applied to workday activities, and therefore, “required the state to provide plaintiffs with support to access mainstream employment and avoid unnecessary segregation.”¹³⁷

In its settlement of *Lane v. Brown*, Oregon agreed to no longer fund new placements into sheltered workshops, and to gradually phase out current employees by providing supports for competitive integrated employment.¹³⁸ The state also agreed to enhance such opportunities through “Supported Employment” services funded by Medicaid.¹³⁹ Supported Employment was defined to include: “Discovery, job development, job-finding, job carving, job coaching, job training, job shadowing, co-worker and peer supports, and re-employment support.”¹⁴⁰ Although this case did not end in a court order, it shows that workshops that rely on Section 14(c) certificate employment may violate the ADA’s integration mandate if they over-rely on sheltering employees with disabilities.¹⁴¹ Further, at least in this case, employees who are phased out of sheltered workshops may be provided with supported employment through Medicaid.¹⁴²

¹³³ Regina Kline, Supplemental Testimony to USCCR at 2.

¹³⁴ Complaint in Intervention of the United States of America at ¶ 3, *Lane v. Kitzhaber*, No. 3:12-cv-00138, ¶ 3 (D. Ore., Mar. 27, 2013), https://www.ada.gov/olmstead/documents/lane_complaint.pdf.

¹³⁵ *Id.* at ¶ 9.

¹³⁶ Zoë Brennan-Krohn, “Employment for People with Disabilities: A Role for Anti-Subordination,” 51 HARV. CIVIL RIGHTS-CIVIL LIBERTIES LAW. REV., 239, 250-251; Complaint in Intervention of the United States at ¶¶ 35-37, 54, 68-70, *Lane v. Kitzhaber*, Case No. 3:12-cv-00138-ST (D. Or. March 27, 2013).

¹³⁷ Brennan-Krohn, *supra* note 136, at 251; *Lane*, 841 F. Supp. 2d at 1203.

¹³⁸ Settlement Agreement, *Lane v. Brown*, No. 3:12-cv-00138 §§ IV – V (D. Ore. 2013), https://www.ada.gov/olmstead/documents/lane_sa.pdf.

¹³⁹ *Id.*, § VII.1(b).

¹⁴⁰ *Id.*, § 12.

¹⁴¹ U.S. Dep’t of Justice, *Fact Sheet on Proposed Agreement over Oregon Supported Employment*, p. 1, https://www.ada.gov/olmstead/documents/lane_fact_sheet.pdf.

¹⁴² Settlement Agreement, *Lane v. Brown*, No. 3:12-cv-00138, § 12 (D. Ore. 2013), https://www.ada.gov/olmstead/documents/lane_sa.pdf.

The Department of Justice (DOJ) also enforced Title II of the ADA as interpreted by *Olmstead* in an action against the State of Rhode Island and the City of Providence for over-reliance on sheltered workshops,¹⁴³ which culminated in a court-ordered consent decree in 2014.¹⁴⁴ In this case, the Department of Labor’s findings of violations of the Fair Labor Standards Act resulted in retroactive revocation of two employers’ 14(c) certificates from 2010 to 2013 and an order that employees be paid the federal minimum wage for hours worked during that period.¹⁴⁵ The Department of Labor referred the matter to DOJ who investigated and found Title II ADA violations due to “unnecessary over-reliance upon segregated sheltered workshops.”¹⁴⁶ The state agreed to take measures to desegregate workers with disabilities and dismantle major aspects of its system that had led to ADA violations through youth career development plans, person-centered planning to transition youth out of the system, cessation of funding for new entrants into sheltered workshops, and supported employment placements, among other measures.¹⁴⁷ DOJ recently dismissed the case against the City of Providence and the court agreed to terminate the consent decree with the City, but the consent decree with the State of Rhode Island is still open and subject to monitoring for compliance.¹⁴⁸

That is, the requirements for supported employment are still enforceable under the terms of the consent decree with the State of Rhode Island. Regarding supported employment, Regina Kline testified that, “[t]he ADA’s integration mandate requires employment service systems to allow those who are qualified for, and who do not oppose doing so, to receive employment supports in the most integrated setting appropriate to their needs.”¹⁴⁹

The Oregon and Rhode Island cases also show that isolated 14(c) workshops can be discriminatory. Regarding isolated workshops, Anil Lewis, Executive Director of Blindness Initiatives at the National Federation of the Blind, testified about how his brother remained in a sheltered workshop because of lack of opportunities:

This noncompetitive segregated environment was not designed for skills acquisition and did not present opportunities for upward mobility. In fact, the supervisors/managers, with

¹⁴³ See Complaint for Declaratory and Injunctive Relief, *United States v. Rhode Island and Providence*, No. CA 13-442 (D. R.I., June 13, 2013), <https://www.ada.gov/olmstead/documents/ri-providence-complaint.pdf>.

¹⁴⁴ Consent Decree, *United States v. Rhode Island*, CA 14-174 (D. R.I., Apr. 9, 2014), <https://www.ada.gov/olmstead/documents/ri-olmstead-statewide-agreement.pdf>.

¹⁴⁵ See Complaint for Declaratory and Injunctive Relief, *United States v. Rhode Island and Providence*, No. CA 13-442, ¶ 6 (D. R.I., June 13, 2013), <https://www.ada.gov/olmstead/documents/ri-providence-complaint.pdf>.

¹⁴⁶ See, Consent Decree, *United States v. Rhode Island*, CA 14-174, § II.E (D. R.I., Apr. 9, 2014), <https://www.ada.gov/olmstead/documents/ri-olmstead-statewide-agreement.pdf>. See Consent Decree, *United States v. Rhode Island*, CA 14-174, § II.E (D. R.I., Apr. 9, 2014), <https://www.ada.gov/olmstead/documents/ri-olmstead-statewide-agreement.pdf>.

¹⁴⁷ Consent Decree, *United States v. Rhode Island*, CA 14-175, § IV (D. R.I., Apr. 9, 2014), <https://www.ada.gov/olmstead/documents/ri-olmstead-statewide-agreement.pdf>.

¹⁴⁸ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 130.

¹⁴⁹ Regina Kline, Supplemental Testimony to USCCR at 1.

no expertise in blindness, actually encouraged employees not to exceed an income that would adversely impact their Social Security Administration (SSA) benefits. Yet, the external perception was that this was a wonderful institution, which offered blind people an opportunity to experience the benefits of “work,” and gave them something to do besides staying at home.¹⁵⁰

Lewis also testified about his experience running a 14(c) sheltered workshop, and how his view of the 14(c) program changed over time:

In full disclosure, I participated in the perpetuation of the FLSA Section 14(c) fallacy that people with disabilities could not be competitively employed by helping run an extended workshop while employed as a Job Placement Specialist at a community rehabilitation center in Atlanta, Georgia. We had blind consumers performing work under contracts for various letter mailing campaigns and small assembly tasks that generated significant revenue for the center. We brought donors, public officials, and employers on tours of the center stating we were providing work readiness training. We received donations, legislative support, but no employment opportunities resulted from our workshop efforts. However, once I received the proper training on how to effectively prepare and assist blind individuals with obtaining employment; and we finally made the decision to close the workshop, we were successful in employing all but one of the fifteen to twenty individuals in the workshop.

In addition to my receiving training on strategies and best practices for facilitating the employment of people with disabilities, the reason for our success was that we evolved as an organization. We changed our philosophy and implemented new strategies. It was nothing revolutionary. We discontinued exploiting the consumers as tools for marketing and fundraising. We set higher expectations for the consumers and ourselves, evaluated the strengths and interests of our consumers, provided specific job skills training, and proactively implemented a job placement strategy that demonstrated how the acquired talents of our consumers met the needs of the employer.¹⁵¹

Lewis also testified how low expectations of people with disabilities can inhibit their ability to work in integrated settings and earn competitive wages.¹⁵² Studies have shown that parental expectations and family engagement are important determinants in the success of transitions of people with disabilities to competitive integrated employment.¹⁵³ Brian Dague of the University

¹⁵⁰ Anil Lewis, Executive Director of Blindness Initiatives, National Federation of the Blind, Written Statement for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights, Nov. 15, 2019, at 2.

¹⁵¹ *Ibid.*, 3.

¹⁵² Lewis Testimony, *Subminimum Wages Briefing*, pp. 269-71.

¹⁵³ Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). *StateData: The national report on employment services and outcomes through 2016*. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion at 11.

of Vermont has documented that some family members feared their relatives with disabilities will face stigmatization and isolation in integrated work environments, hence the need to ensure that their family members are safe in sheltered employment environments.¹⁵⁴

Some have argued that persons with intellectual and developmental disabilities have the most challenges and need the most protection or “a safe, supported, and understanding atmosphere.”¹⁵⁵ Census data also shows lower employment rates among this group, compared with people without intellectual and developmental disabilities.¹⁵⁶ But at the Commission’s briefing, Jennifer Mathis, Director of Policy and Legal Advocacy at the Bazelon Center for Mental Health Law and member of the Commission’s Maryland State Advisory Committee, provided testimony to the Commission that people with intellectual and developmental disabilities will find employment success in integrated settings if provided with the right supports.¹⁵⁷ Mathis further explained that:

Supported employment is founded on the belief that every person with a disability is capable of working competitively in the community if the right kind of job and the work environment, can be found. These services help people find jobs that align with their interests and strengths.¹⁵⁸

Some 14(c) workshops are sheltered or segregated, while others may be integrated and yet pay subminimum wages. Data provided to the U.S. Commission on Civil Rights by the Department of Labor shows that even with permission to pay subminimum wages, a high percentage of 14(c) certificate holders investigated by the Wage and Hour Division have violated the labor rights of workers with disabilities. Over the last 10 years, an average of eight percent of all 14(c) workshops in the country were investigated each year, and the great majority of those investigated were in violation of even the subminimum wage rules and were ordered to pay back pay.¹⁵⁹

In addition to the integration of services required by *Olmstead*, Community Rehabilitation Programs using 14(c) certificates may be required to integrate their services to receive federal or state funding. Medicaid-funded Home and Community Based Services, a major source of funding for employment services for people with disabilities, will no longer be approved in segregated settings beginning in 2022.¹⁶⁰ Additionally, vocational rehabilitation funding, another source of funding for services for people with disabilities, contains requirements that these services be used to assist people with disabilities to work in competitive integrated employment, including that

¹⁵⁴ Dague, Bryan, Sheltered employment, sheltered lives: Family Perspectives of conversion to community-based employment, *Journal of Vocational Rehabilitation* 37 (2012) at 2-4.

¹⁵⁵ Tracy Gritsenko, A-Team Missouri, Testimony, *Subminimum Wages Briefing*, p. 360.

¹⁵⁶ See *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*, U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 72-73.

¹⁵⁷ Mathis Testimony, *Subminimum Wages Briefing*, p. 190.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

employees with disabilities must be afforded a chance to “[interact] with other persons who are not individuals with disabilities . . . to the same extent that individuals who are not individuals with disabilities and who are in comparable positions interact with other persons.”¹⁶¹

States must separately comply with each of these legal standards of integration. As the D.C. Department on Disability Services explained in a Question and Answer document,

“A determination that a setting complies with the HCBS settings rules does not necessarily mean that it is an “integrated setting” under the ADA, and CMS’ approval of a state’s transition plan does not necessarily mean that the state is in compliance with the ADA and *Olmstead*. A state may violate the ADA when its service system is overly reliant on “segregated settings”.”¹⁶²

Likewise, “competitive integrated employment” has a specific definition in the Rehabilitation Act for the purposes of vocational rehabilitation funding.¹⁶³ Despite these definitional nuances, each of these legal requirements indicates a strong public policy preference for integrated services. As the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities put it, “presumed employability of people with significant disabilities is implicit in relevant federal legislation.”¹⁶⁴

Wage Discrimination Issues

In 2012, in the case of *EEOC v. Hill Country Farms*, the Equal Employment Opportunity Commission (EEOC) won partial summary judgement and a multi-million dollar jury award against an employer paying subminimum wages under Title I of the Americans with Disabilities Act (ADA), which prohibits both public and private employers from discriminating against employees with disabilities.¹⁶⁵ Notably, these types of damages are not available against states, but they are available against private employers.¹⁶⁶ The EEOC’s lawsuit against *Hill Country Farms* involved discrimination against 32 individuals with intellectual disabilities working at subminimum wages at a turkey farm in Iowa.¹⁶⁷ The farm had a 14(c) certificate from 2006 to 2009, but the Department of Labor and federal courts found that its practices violated the Labor

¹⁶¹ 29 U.S.C. § 705(5)(B) (2014).

¹⁶² D.C. Department on Disability Services, *Questions and Answers About The Home and Community Based Services (HCBS) Settings Rules*, p. 5 (Feb. 2015) https://dds.dc.gov/sites/default/files/dc/sites/dds/publication/attachments/HCBS_percent20QA_percent20percent282.19.15_percent20final_percent29.pdf. (citing CMS and DOJ explanations of state obligations).

¹⁶³ 29 U.S.C. § 705(5)(B).

¹⁶⁴ ACICIEID Report at 9. The Committee also recommended federal agencies align policies and definitions to promote competitive integrated employment. ACICIEID Report at 11-12.

¹⁶⁵ *E.E.O.C. v. Hill Country Farms*, 899 F. Supp. 2d 827 (S.D. Iowa 2012), *aff’d* 564 Fed.Appx. 868 (Mem) (8th Cir. 2014).

¹⁶⁶ See *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*, U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 131. (discussing *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 360 (2001)).

¹⁶⁷ *Hill Country Farms*, 899 F. Supp. 2d at 830-31.

Act as the employees with disabilities “were performing as productively and effectively as non-disabled workers.”¹⁶⁸ In the EEOC’s subsequent litigation under the ADA, EEOC was able to secure over a million dollars in back pay for the employees,¹⁶⁹ and a jury awarded the workers \$240 million for disability-based harassment, discrimination and abuse.¹⁷⁰ This case does not directly address whether 14(c)’s permitting payment of subminimum wages violates the ADA, but it does illustrate that Title I ADA violations are possible under those circumstances.¹⁷¹

Recently, multiple media outlets as well as federal investigations have reported that some workers with disabilities are making well below the minimum wage, including some extreme cases involving employers paying people with disabilities as little as 4 cents an hour.¹⁷² According to Alison Barkoff, Director of Advocacy at the Center for Public Representation, recently private litigation has been filed to enforce Title I of the ADA against sheltered workshops. For example, in 2018, an ADA complaint was filed in federal court on behalf of individuals in a sheltered workshop in Ohio run by Roppe and Seneca, which allegedly employed more than 100 persons with disabilities in a segregated “sampling division” to produce samples of flooring materials.¹⁷³ Several employees alleged that Title I was violated by the 14(c) employer “utilizing standards, criteria, and methods of administration with regard to job application procedures, hiring, advancement, *employee compensation*, job training and other terms, conditions, and privileges of employment [that] have had the effect of discriminating against Plaintiffs on the basis of disability.”¹⁷⁴ Plaintiffs also alleged that employees with disabilities were paid according to the work assigned, that some were paid at a piece-rate,¹⁷⁵ and that “staff . . . have assigned Plaintiffs to the same mundane and rote tasks based on erroneous assumptions about their individual disabilities[.]”¹⁷⁶ Further, the complaint stated that:

¹⁶⁸ *Id.* at 832; *see also* Solis v. Hill Country Farms, 808 F.Supp.2d 1105 (S.D. Iowa 2011), *aff’d*, 469 Fed.Appx. 498 (8th Cir. 2012).

¹⁶⁹ Hill Country Farms, 899 F. Supp. 2d at 833-34.

¹⁷⁰ *Jury Awards \$240 Million for Long-Term Abuse of Workers with Intellectual Disabilities*, United States Equal Emp’t Opportunity Comm’n (May 1, 2013), <https://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm>.

¹⁷¹ Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (“It is important to note that the employer did not have a valid certificate at the time of the case.”) (on file).

¹⁷² Anna Schecter, Monica Alba, and Mark Schone, *More disabled workers paid just pennies an hour*, NBC News (Aug. 10, 2013) <https://www.nbcnews.com/news/investigations/more-disabled-workers-paid-just-pennies-hour-v19916979>; Cheryl Corley, *Subminimum Wages For The Disabled: Godsend Or Exploitation?* NPR (April 23, 2014) <https://www.npr.org/2014/04/23/305854409/subminimum-wages-for-the-disabled-godsend-or-exploitation>; Alison Knezevich, *Subminimum wage’ for disabled workers called exploitative*, The Baltimore Sun (Jun. 14, 2014) <https://www.baltimoresun.com/news/investigations/bs-md-subminimum-wage-20140614-story.html>; Alexia Fernández Campbell, *A loophole in federal law allows companies to pay disabled workers \$1 an hour*, Vox Media (May 3, 2018) <https://www.vox.com/2018/5/3/17307098/workers-disabilities-minimum-wage-waiver-rock-river-valley-self-help>.

¹⁷³ Complaint at ¶¶ 2 (type of business), 17 (employing persons with disabilities) and 34 (segregated sampling division), Steward, Magers, and Felton v. Roppe Corp., Seneca Re-ad Industries, Inc. and Seneca Cty. Bd. of Developmental Disabilities, No. 3:18-cv-2905 (N.D. Ohio, Dec. 18, 2018).

¹⁷⁴ *Id.* at ¶ 103 (emphasis added).

¹⁷⁵ *Id.* at ¶ 36.

¹⁷⁶ *Id.* at ¶ 38.

Until February 2016, Plaintiffs were erroneously paid less than minimum wage (as little as \$2.00 per hour) under the guise of certificates issued to Seneca by the United States Department of Labor to Seneca [sic] pursuant to 29 U.S.C. § 214(c) (i.e., “14(c) certificate”). As part of the 14(c) certificate program, under the Fair Labor Standards Act (“FLSA”), Seneca is permitted to pay only individuals with disabilities who are “disabled for the work performed” subminimum wages.¹⁷⁷

After they were found to be in violation of 14(c) by misclassifying the Plaintiffs, Defendants allegedly capped their wages at the level of the Ohio minimum wage, based on their status as persons with disabilities, rather than permitting them to earn higher wages—and the average wage for other workers in their company was nearly double minimum wage.¹⁷⁸ Defendants answered by denying the allegations,¹⁷⁹ and at the time of this writing, the litigation is still ongoing.¹⁸⁰

Barkoff also noted that “[o]ther litigants have challenged unfair hiring practices by sheltered workshops using state human rights law, including an individual in Minnesota whose sheltered workshop refused to consider him for a promotion, claiming he was a ‘client’ and not an ‘employee.’”¹⁸¹

Similarly, in 2017, Michael Denoewer, a person with a disability, filed a lawsuit against Union County Industries, a 14(c) certificate holder in Marysville, Ohio; the Union County Board of Developmental Disabilities; the Columbus Center for Human Services; and Honda of America Manufacturing, Inc.¹⁸² Denoewer alleged in his complaint that these defendants had consistently assigned him to lower paying jobs based on his perceived disability without engaging in any individualized analysis of his ability to perform higher paying work, even though the job description for the production associate job that Denoewer held included work on higher paying assembly lines.¹⁸³ Denoewer was paid a subminimum wage for the entire duration of his employment; “[i]n 2012, Mr. Denoewer’s average wage per hour, after taxes, was approximately

¹⁷⁷ *Id.* at ¶ 46; *see also*, ALJ’s Decision and Order, In Re: Magers, Steward, and Felton v. Seneca Re-Ad Industries, No. 2016-FLS-3 (Dep’t. of Labor, Office of Administrative Law Judges, Feb. 2, 2016), https://www.disabilityrightsohio.org/assets/documents/decision_and_order_from_the_alj_re_seneca-re-ad.pdf?pdf=seneca_decision.

¹⁷⁸ *supra* n. 173 at ¶ 50.

¹⁷⁹ *See, e.g.*, Answer of Roppe Corporation, Steward, et. al. v. Roppe Corp., et. al., No. 3:18-cv-2905 (N.D. Ohio, Mar. 8, 2019) (on file).

¹⁸⁰ *See* PACER, Civil Docket for Case No. No. 3:18-cv-2905 (N.D. Ohio), (last accessed 1/24/20).

¹⁸¹ Alison Barkoff, Responses to Follow-Up Questions from the U.S. Commission on Civil Rights (Jan. 10, 2020) (on file), *citing* Chris Seres, *Minnesota man with disability wins round in fight for job promotion*, Star Tribune, July 18, 2018, <http://www.startribune.com/minnesota-man-with-disability-wins-round-in-fight-for-job-promotion/387357271>.

¹⁸² *See*, Complaint, Denoewer v. UCO Indus., Inc., 2:17-cv-00660 (S.D. Ohio 2017).

¹⁸³ *Id.*; *see also*, Regina Kline, Response to USCCR Follow-Up Questions at 5.

\$1.74. In 2013, it was just \$1.67 per hour.”¹⁸⁴ To date, *Denoewer* is pending before the federal district court in Ohio.¹⁸⁵

At the Commission’s briefing, John Anton from the Massachusetts Down Syndrome Congress also spoke about the need to pay all people with disabilities a competitive wage, stating that:

I’d like to address the subminimum wages which are currently legal and it’s the asset to companies with a huge drawback to those of us who need to make a living. We pay rent, utilities, pay for transportation and buy food, clothing, and other expenses as well as we are able to have a social life like all of you. We cannot live a full life on a subminimum wage paycheck. We cannot be respected, valued employees, and members of our community.¹⁸⁶

Attorney Derek Manners, who also testified at the Commission’s briefing, spoke about how low expectations for people with disabilities had impacted his life, as follows:

My current salary, not to brag, is \$250,000 a year. My sub-minimum wage hourly rate was \$2.25 an hour. I’ve had the same level of vision in that job and in my current job. . . . my guidance counselor at my high school thought that because I was a person with a disability, that I would not be able to go to college, and that it was a good idea for me to get experience in the workplace. And so I was placed with a sub-minimum wage employer because she thought that’s all that I would be capable of doing. I enjoyed that job. If you had polled me and asked me how I felt in that job, I would have said I felt rewarded. I would have said that I had friends there. I would have said that that \$2.25 an hour was fair and that I enjoyed my job. . . . The idea that the repeal of 14(c) is somehow a violation of civil rights for people with disabilities is laughable and ignorant. . . . When I was at Harvard Law School, I thought I would be for sure the first blind person to ever go to Harvard . . . To my surprise, there were six. . . . There were also people with other disabilities. The range of capabilities for people with disabilities is not something that you can draw from a statistic.¹⁸⁷

Finn Gardiner, Communications Specialist at the Lurie Institute for Disability Policy at Brandeis University stated that:

The problem with sub-minimum-wage work is that it engenders stereotyping. It sends the message, as several other panelists have said, that if you are a worker with a disability, who is deemed to be somehow less productive than other members of society, then you are only worth being paid pennies on the dollar¹⁸⁸

¹⁸⁴ *Id.*, at 5.

¹⁸⁵ Civil Docket, *Denoewer v. UCO Indus., Inc.*, 2:17-cv-00660 (S.D. Ohio 2017).

¹⁸⁶ John Anton Testimony, *Subminimum Wages Briefing*, p. 129.

¹⁸⁷ Derek Manners Testimony, *Subminimum Wages Briefing*, pp. 354-55.

¹⁸⁸ Gardiner Testimony, *Subminimum Wages Briefing*, p. 138.

On the other hand, the Commission received testimony in support of 14(c), indicating that the productivity of persons with disabilities may be lower than that of persons without disabilities, and that this lower productivity may justify subminimum wages. For example, U.S. Representative Glenn Grothman of Wisconsin stated that:

[I]f you can only move one arm, if you have to hold somebody's head up, if you have a personality thing where you might have a fit or something like that, it's hard to find an employer who is going to pay \$7.50 an hour for that. But in a work center you can pay them \$1.50, two bucks, four bucks an hour, and together with subsidizing with [Supplemental Security Income] or [Social Security Disability Insurance], they can do okay.¹⁸⁹

In her written testimony to the Commission, Dr. Julie Christensen, Director of Policy and Advocacy at the Association of People Supporting Employment First, challenged the perception that people with disabilities have reduced productivity stating that:

I am often asked whether it is “fair to make an employer” pay the full minimum wage when an employee is not working at 100 percent productivity. I have several answers to this question. Given what we now know and have available to us in 2019, I fundamentally question the notion that someone simply cannot work competitively. If someone is truly not performing at 100 percent, my assumption is that something is missing or out of place:

- Perhaps the individual needs better or different training.
- Maybe the correct supports have not yet been put in place to ensure the individual's success.
- Is it possible that there is a reasonable accommodation, perhaps the use of assistive or other technology, that is missing?
- At the end of the day – maybe it's just not a good job match for that individual.¹⁹⁰

Ruby Moore, Executive Director of the Georgia Advocacy Office, wrote in her testimony to the Commission about how with the right supports, people with disabilities are capable of contributing to the places they work:

One commonly held misunderstanding is that people making subminimum wages in sheltered workshops are different than their peers with disabilities who work in competitive, integrated employment making the same wages as their non-disabled coworkers, with the same benefits, opportunities for advancement, and the same level of interaction with non-disabled peers as their coworkers that don't have disabilities. This is simply not true. What IS different are the beliefs held about the individuals with disabilities, and the expectations and resulting opportunities and supports offered. We have

¹⁸⁹ Grothman Testimony, *Subminimum Wages Briefing*, pp. 257-58.

¹⁹⁰ Christensen Statement at 4.

many decades of research and demonstration of what people with disabilities are capable of when given the chance. There are countless stories of people who were long in 14c situations and are now competitively employed.¹⁹¹

Anil Lewis of the National Federal of the Blind described the harm of subminimum wage employment, particularly in segregated settings, in this way:

We must openly and honestly admit that there are strong harmful results to the institutionalization of anyone within an environment that eventually convinces them that they have no capacity and have reached their full potential. Moreover, we mask the systemic failures that cause this harm by convincing the parents and family members that it is the disability that prohibits success, and not the lack of professional intervention and implementation of proven strategies to facilitate competitive integrated employment.¹⁹²

Developmental Disabilities Assistance and Bill of Rights Act of 2000

Congress passed the Developmental Disabilities Assistance and Bill of Rights Act in 2000.¹⁹³ The Act affirms that individuals with developmental disabilities have the right to integrated services consistent with their needs, through legislative language stating that:

The treatment, services, and habitation for an individual with developmental disabilities should be designed to maximize the potential of the individual and should be provided in the setting that is least restrictive of the individual's personal liberty.¹⁹⁴

The Act provides funding to establish state councils on developmental disabilities.¹⁹⁵ These state councils are directed to build capacity within states to serve people with developmental disabilities and to promote programs that seek systems change to encourage integrated services.¹⁹⁶ It requires that:

[a]s a condition of providing assistance under this title, the Secretary [of Health and Human Services] shall require that each recipient of such assistance take affirmative action to employ and advance in employment qualified individuals with disabilities. . . .¹⁹⁷

Furthermore, the Act requires that membership on state councils on developmental disabilities be comprised of at least sixty percent individuals with developmental disabilities, parents or guardians

¹⁹¹ Moore Statement, at 2-3 (emphasis in original).

¹⁹² Anil Lewis, Written Statement, p. 4.

¹⁹³ Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001 *et seq.*, Pub. L. 106-402, 114 Stat. 1677 (2000).

¹⁹⁴ 42 U.S.C. § 15009(a)(2) (2000).

¹⁹⁵ See 42 U.S.C. § 15021 *et seq.*

¹⁹⁶ *Id.*

¹⁹⁷ 42 U.S.C. § 15007 (2000).

of individuals with developmental disabilities, or immediate relatives of adults with developmental disabilities.¹⁹⁸

The Act also provides for the establishment of a national network of university centers for excellence in developmental disabilities education, research, and service.¹⁹⁹ This network of centers for excellence is tasked with advising federal, state, and local officials about people with developmental disabilities and to advocate for increased opportunities for people with developmental disabilities.²⁰⁰

Workforce Innovation and Opportunity Act of 2014

Congress passed the Workforce Innovation and Opportunity Act in 2014.²⁰¹ The Workforce Innovation and Opportunity Act was designed to accomplish broad job training and education services to assist unemployed or underemployed individuals secure employment in twenty-first century jobs. The Act includes amendments that created Section 511 of the Rehabilitation Act to expand vocational rehabilitation services for people with disabilities.²⁰² The primary goals of the Workforce Innovation and Opportunity Act's reforms to the Rehabilitation Act were to end the pipeline of students with disabilities from schools to sheltered workshops, and to encourage the transition of people with disabilities in secondary and post-secondary education to competitive integrated employment.²⁰³ The Workforce Innovation and Opportunity Act also intended to make a transition from secondary and/or postsecondary education to competitive integrated employment the primary federal policy goal through expanding supported employment services for individuals with disabilities.²⁰⁴ As federal law, these requirements apply in states with 14(c) programs as well as in states that have transitioned away from 14(c) and prohibited subminimum wages.²⁰⁵

The Commission recognized the importance of providing job training to people with disabilities in the 2000 report entitled *Sharing the Dream: Is the ADA Accommodating All?* The Commission found that organizations were successful in moving people with disabilities from temporary or part-time employment to full-time employment when people with disabilities are given the opportunity to receive job training or vocational services.²⁰⁶

¹⁹⁸ 42 U.S.C. § 15025(b)(3) (2004).

¹⁹⁹ 42 U.S.C. § 15061 *et seq.*

²⁰⁰ 42 U.S.C. § 15063(a)(1) (2000).

²⁰¹ Workforce Innovation and Opportunity Act, 29 U.S.C. § 795g, Pub. L. 113-128, 128 Stat. 1425 (2014).

²⁰² 29 U.S.C. § 723 (as amended by the Workforce Innovation and Opportunity Act Pub. L. 113-128, 128 Stat. 1425 (2014)).

²⁰³ Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at 28 (Sept. 15, 2016).

²⁰⁴ 29 U.S.C. § 795g (2014).

²⁰⁵ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities," U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 34. (job training & career counseling requirements as applied in 14(c) programs, and job training & career counseling applied in Vermont).

²⁰⁶ U.S. Comm'n on Civil Rights, *Sharing the Dream: Is the ADA Accommodating All?* at 22 (2000) <https://www.usccr.gov/pubs/ada/main.htm>.

In addition to the above, the Workforce Innovation and Opportunity Act also placed restrictions on the payment of subminimum wages to individuals with disabilities age 24 and younger, unless at least one of two conditions is met.²⁰⁷ The first is if the individual with a disability (age 24 and younger) is already employed by an entity holding a valid 14(c) certificate at the time the Workforce Innovation and Opportunity Act was enacted.²⁰⁸ The second exception is if before beginning work at a subminimum wage, the individual with a disability (age 24 and younger) provides documentation proving that the individual has received pre-employment services or school to work transition services. The documentation must prove that the individual has applied for vocational rehabilitation services and has either been found ineligible or the individual had a plan for employment, worked toward their employment outcome without success, and the vocational rehabilitation case was closed; also, they must have been provided with career counseling.²⁰⁹

Finally, the Workforce Innovation and Opportunity Act requires that every 14(c) certificate holder verify and review documentation from all employees with disabilities earning a subminimum wage that they have received career counseling, information and referrals from the designated state unit.²¹⁰ The 14(c) employer must also provide employees with disabilities earning a subminimum wage with information and referrals to federal and state programs, as well as other resources in the geographic area that offer services and supports designed to enable the employee to attain competitive integrated employment.²¹¹ The Workforce Innovation and Opportunity Act requires that individuals with disabilities earning subminimum wages must receive the career counseling, information and referrals and be informed of opportunities for competitive integrated employment at least once every six months during their first year of employment, and at least once every year thereafter.²¹² Section 511 requires all workers with disabilities earning a subminimum wage to be provided with services on a recurring basis by the state's vocational rehabilitation agency and the worker's employer.²¹³ Within the time intervals described below, vocational rehabilitation agencies must provide each subminimum wage worker with career counseling, information, and referrals to federal and state programs and other resources that support the individual to explore and attain competitive integrated employment. Career counseling and referrals must:

1. Be understandable to the individual, and
2. Facilitate informed choice and independent decision-making regarding employment.²¹⁴

²⁰⁷ 29 U.S.C. § 794g(a) (2016).

²⁰⁸ 29 U.S.C. § 794g(a)(1) (the provisions of the Workforce Innovation and Opportunity Act went into effect on July 22, 2016).

²⁰⁹ 29 U.S.C. § 794g(a)(2).

²¹⁰ 29 U.S.C. § 794g(c)(1).

²¹¹ 29 U.S.C. § 794g(c)(1).

²¹² 29 U.S.C. § 794g(c)(2).

²¹³ 29 U.S.C. § 794g(c).

²¹⁴ 34 C.F.R. § 397.40(a)(2).

Employers must provide each subminimum wage worker with information about self-advocacy, self-determination, and peer mentoring training opportunities available within the worker's geographic area. These training opportunities may be provided by a federal or state program or other entity but may not be provided by any entity that holds a 14(c) certificate.

In testimony to the Commission, the Wage and Hour Division confirmed that the agency includes a review of Section 511 compliance in every Section 14(c) investigation.²¹⁵ However, according to Alison Barkoff from the Center for Public Representation, the Rehabilitation Services Administration is the agency within the Department of Education responsible for overseeing Section 511 and its regulations. After the Workforce Innovation and Opportunity Act's enactment, the Rehabilitation Services Administration promulgated Section 511's implementing regulations and created guidance clarifying the requirements and the meaning of "competitive integrated employment." Barkoff noted in her written testimony to the Commission that pressure from providers who could not meet the integration requirements led the Department of Education to announce in 2017 that it intended to reopen the regulations. Despite broad opposition to changing the regulations, including a report issued by the Senate Health, Education, Labor, and Pensions Committee finding that the regulations should not be changed, the Department of Education's most recent unified agenda continues to indicate that the Rehabilitation Services Administration is considering doing so.²¹⁶ The Rehabilitation Services Administration is also responsible for providing technical assistance with regard to Section 511, and for collecting and analyzing data on Section 511's implementation. To date, the Rehabilitation Services Administration has not made any such data publicly available.²¹⁷ Barkoff also stressed this in her verbal testimony, stating that there is a lack of data from the Department of Education on how state vocational rehabilitation agencies are coming into compliance with Section 511's requirements.²¹⁸

As Michele Ford, Chief Executive Officer of Inroads to Opportunities, a Community Rehabilitation Program, testified to the Commission, the form the required counseling takes can vary between 14(c) providers.²¹⁹ Ford testified that Inroads to Opportunities offers counseling to employees working under 14(c) certificates in the form of fifteen to twenty minute meetings with an employment counselor.²²⁰

Dr. John Butterworth testified that compliance with Section 511's counseling requirements "varies from a group of people being gathered to watch a video, to focused individual counseling sessions."²²¹ Butterworth described a disparity between states with regard to the effectiveness of

²¹⁵ Ziegler Statement, at 7. See, U.S. Dep't of Labor Wage and Hour Division, Field Assistance Bulletin No. 2016-2, p.2, (July 27, 2016) https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2016_2.pdf.

²¹⁶ Barkoff Statement, at 7-8.

²¹⁷ Ibid., 8.

²¹⁸ Barkoff Testimony, *Subminimum Wages Briefing*, pp. 63-64.

²¹⁹ Ford Testimony, *Subminimum Wages Briefing*, pp. 145-147.

²²⁰ Ibid., 147.

²²¹ Butterworth Testimony, *Subminimum Wages Briefing*, p. 105.

these counseling activities, saying that in some, “very few people say that they want to work after having that experience,” while in others “as many as 85 percent of people who are working in workshops say that they want to work after having that experience.”²²² However, both Butterworth and another briefing panelist, Dr. Teresa Grossi, Director of Strategic Developments at the Indiana Institute on Disability and Community at Indiana University, stressed that there is a lack of data with regard to the effectiveness of Section 511 implementation efforts. Butterworth said: “there's not strong data on the relationship between implementation of pre-employment transition services and outcomes available at this point.”²²³ Butterworth later added that there is a lack of sufficient or trustworthy data from schools regarding employment outcomes.²²⁴

However, in contrast, Commission staff interviews with employees with disabilities in Virginia and Vermont revealed that they perceived they received little job training or career counseling. In particular, in Virginia, employees described watching videos as the main form of job training or career counseling.²²⁵ In Vermont, interviewees discussed more complex career counseling, but most job or skills training appeared to be received on-the-job in both states.²²⁶

In addition to new requirements placed upon 14(c) certificate holders, the Workforce Innovation and Opportunity Act of 2014 approved federal funds to study the impact of the 14(c) program on individuals with disabilities. The Workforce Innovation and Opportunity Act established the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities to make recommendations to the Department of Labor and to Congress.²²⁷ The bipartisan Advisory Committee was comprised of advocates for individuals with intellectual or developmental disabilities, employment service providers, representatives of national disability advocacy organizations, academics with expertise in wage and policy issues for people with disabilities, representatives from the employer community, representatives from organizations with expertise in expanding opportunities for people with disabilities, and federal government officials.²²⁸ The legislative purpose of the Advisory Committee was to study the following:

- (1) Ways to increase the employment opportunities for individuals with intellectual or developmental disabilities or other individuals with significant disabilities in competitive integrated employment;

²²² Ibid.

²²³ Ibid., 107.

²²⁴ Ibid., 108-109.

²²⁵ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 160, and 163.

²²⁶ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 199, 201, 202, 203, 204, and 207.

²²⁷ 29 U.S.C. § 795n.

²²⁸ 29 U.S.C. § 795n(c); Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at ix-xi (Sept. 15, 2016), https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf.

(2) The use of the certificate program carried out under [Section 14(c) of the Fair Labor Standards Act] for the employment of individuals with intellectual or developmental disabilities, or other individuals with significant disabilities; and

(3) Ways to improve oversight of the use of such certificates.²²⁹

In its final report in September 2016,²³⁰ the Advisory Committee made several findings and recommendations to the Secretary of Labor, the U.S. Senate Committee on Health, Education, Labor, and Pensions, and the U.S. House of Representatives Committee on Education and the Workforce, with regard to subminimum wages and the use of 14(c) certificates.²³¹ The report found that in January of 2015, the estimated number of workers under all 14(c) certificates was 228,600.²³² Those employees with disabilities worked at 2,820 certificate holders, 89 percent of which were Community Rehabilitation Programs in 2015.²³³ In 2014, 75 percent of individuals with intellectual or developmental disabilities (in Community Rehabilitation Programs) were receiving day or employment services in a segregated settings.²³⁴ Overall, the Advisory Committee found that current 14(c) regulations and policies do not align with modern federal disability policy.²³⁵

The Advisory Committee's recommendations with regard to the employment of people with disabilities and the 14(c) program had three primary areas of focus. First, the committee recommended that Congress should amend the Fair Labor Standards Act to allow for multi-year phase-out of 14(c) including well planned measures to mitigate any lapse in services people with disabilities receive from certificate holders.²³⁶ Second, the Wage and Hour Division should engage in stronger oversight of certificate holders and use stricter standards for issuance and review of certificates.²³⁷ Third, the federal government should assist states in building capacity to support transition to competitive integrated employment as an alternative to continuing sheltered employment.²³⁸

²²⁹ 29 U.S.C. § 795n(f).

²³⁰ As stated in the disclaimer to the Advisory Committee's final report, neither the report nor its final recommendations were "cleared or approved by the Secretary of Labor, the U.S. Department of Labor, nor the Administration, and, as such, the views expressed in this report should not be regarded as those of the Secretary, the Department, or the Administration." See Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at iii.

²³¹ Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, pp. 29-31.

²³² Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, p. 28.

²³³ Ibid.; See *supra*, note **Error! Bookmark not defined.**

²³⁴ Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, p. 28.

²³⁵ Ibid., p. 29.

²³⁶ Ibid., p. 29.

²³⁷ Ibid.

²³⁸ Ibid.

The Advisory Committee recommendations also emphasized that the federal government should ensure that the transition away from the use of 14(c) certificates should be gradual, and that any phase-out would not negatively impact the provision of services to people with disabilities working for 14(c) certificate holders.²³⁹ Further, they recommended that the Department of Labor should incorporate input from federal partners including Centers for Medicare & Medicaid Services, the Administration on Community Living, the Rehabilitation Services Administration, and the Department of Justice to ensure that any phase out of the 14(c) program is accomplished in the least disruptive manner.²⁴⁰

In addition, the Advisory Committee recommended that before the 14(c) certificate program is fully phased out, the Wage and Hour Division should only issue 14(c) certificates after the state in which the entity requesting the certificate is located certifies to the Wage and Hour Division that there is a current lack of employment opportunities for people in that state.²⁴¹ They stated that the Department of Labor should coordinate with the Department of Health and Human Services, the Department of Education, and the Social Security Administration to provide technical assistance to states encouraging the transition of 14(c) certificate holders to employment agencies that offer competitive integrated employment opportunities.²⁴²

The Committee further recommended that technical assistance should include redesigning business plans of Community Rehabilitation Programs, staff training, restructuring staff roles, information on delivery of services, repurposing of facilities. Similarly, entities applying or renewing their 14(c) certificates should be required to submit evidence that the certificate is “necessary to prevent the curtailment of opportunities for employment” for people with disabilities.²⁴³ The Advisory Committee also recommended that the Wage and Hour Division should require certificate holders to take more concrete steps to assist people with disabilities in obtaining jobs in competitive integrated employment, as required by the Workforce Innovation and Opportunity Act.²⁴⁴ Finally, the Advisory Committee recommended that the federal government and service providers should ensure that people with disabilities have the information needed to make informed choices about their employment options.²⁴⁵ The Wage and Hour Division told the Commission that it reviews Section 511 compliance, including whether 14(c) employees

²³⁹ Ibid.

²⁴⁰ Ibid., p. 30.

²⁴¹ Ibid.; *see also*, 29 C.F.R. § 525.9 (criteria for employment of workers with disabilities at subminimum wages includes issuing certificates “...in order to prevent the curtailment of opportunities for employment...” of people with disabilities).

²⁴² Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, p.30.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid., 29-30; *See* Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 125.

are receiving required information about competitive integrated employment opportunities, in each investigation it conducts.²⁴⁶

Alternative Policies and Reforms to Section 14(c)

In recent years, efforts to reform or otherwise phase out 14(c) have been fruitful at the state level, but they have not yet been passed at the federal level. As Congressman Bobby Scott noted in his testimony to the Commission, “In 2016, both major party platforms included support for legislation ending the payment of subminimum wages to people with disabilities.”²⁴⁷ While no significant federal reforms to the 14(c) program have occurred since Congress passed the Workforce Innovation and Opportunity Act in 2014, bills currently pending before both houses of Congress offer insight into how the federal government may achieve a phase-out of 14(c) certificates or improve the program. One approach would gradually eradicate subminimum wages through phase-out programs,²⁴⁸ and another would leave 14(c) in place, and also encourage integrated employment programs for persons with disabilities through tax credits and other incentives.²⁴⁹ Another approach is “Employment First,” which is a push towards increasing competitive integrated employment opportunities for persons with disabilities in community employment settings before considering other employment options such as subminimum wage employment or non-employment day services.²⁵⁰ Elements of all of these models have been tried at the state level in recent years.²⁵¹

Phasing Out 14(c) with Transformation to Competitive Integrated Employment Act

This policy alternative phases out Section 14(c) by providing supports for states and current 14(c) employers to help train persons with disabilities for competitive integrated employment. At the Commission’s briefing, Julie Christensen, Policy Director at the Association of People Supporting Employment First, testified that these types of supports may be needed *precisely because* employees with disabilities have been sheltered and have not been able to develop their skills.²⁵² Moreover, these types of programs would help alleviate the concern that people would lose their

²⁴⁶ See *supra*, Notes 210-218 (discussing requirements under Section 511 of the Rehabilitation Act to provide information about competitive integrated employment).

²⁴⁷ Scott Statement, at 5.

²⁴⁸ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 38-41.

²⁴⁹ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 49-50.

²⁵⁰ See, Association of People Supporting Employment First, *APSE Statement on Employment First*, pp. 1-2 (Oct. 11, 2010), <https://apse.org/wp-content/uploads/2018/05/APSE-Employment-First-Statement.pdf>.

²⁵¹ Cite to USCCR chapter 4 (discussing specific states and how policy alternatives are playing out in the states).

²⁵² Christensen Testimony, *Subminimum Wages Briefing*, p. 239.

jobs if 14(c) were abruptly ended.²⁵³ This type of policy parallels state policies that are in the process of or have transitioned from 14(c) to competitive integrated employment.²⁵⁴

At the federal level, the bipartisan Transformation to Competitive Employment Act of 2019 would phase out 14(c) by assisting states and 14(c) certificate holders with transitioning away from subminimum wage employment of people with disabilities.²⁵⁵ The main vehicles proposed are through grants and technical assistance to states and entities to encourage the transition to competitive integrated employment of people with disabilities.²⁵⁶ Representative Bobby Scott (D-VA), who introduced the Act in the House, testified at the Commission's briefing about how the Act seeks to enable a transition to competitive employment for people with disabilities:

This bill provides states and employers across the country with resources to work with the disability community towards creating fully integrated competitive employment opportunities for individuals with disabilities.²⁵⁷

Specifically, the bill establishes the competitive state grant program to help providers with 14(c) certificates change their business models and assist workers with disabilities to make the transition to competitive integrated employment. Even in states that resist efforts to eliminate subminimum wage for workers with disabilities, the bill will also provide grants directly to providers.²⁵⁸

Scott highlighted the importance of a well-planned phase out of the 14(c) program to ensure that people with disabilities are not left without necessary supports, testifying that:

I think phasing in [the Transformation to Competitive Employment Act] makes it easier to get the job done. When you have an abrupt change, sometimes the adjustment is very difficult. But by phasing [Section 14(c)] out, that gives people a lot of time to adjust to make sure the supports are there. And you don't have the problem of an abrupt change where people may be left in the lurch.²⁵⁹

Congresswoman Cathy McMorris Rodgers (R-WA), a lead co-sponsor of the bill, wrote to the Commission to describe the impact the bill would have. "This legislation would phase out this

²⁵³ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities," U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 92.

²⁵⁴ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities," U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 193-195.

²⁵⁵ Transformation to Competitive Employment Act, S. 260/H.R. 873 § 3(1), 116th Cong. (Introduced concurrently in the U.S. Senate and U.S. House of Representatives on Jan. 29. 2019).

²⁵⁶ *Id.*

²⁵⁷ U.S. Representative Robert C. Scott Testimony, *Subminimum Wages Briefing*, p. 17; Transformation to Competitive Employment Act, S. 260/H.R. 873 § 101, 116th Cong. (2019).

²⁵⁸ *Id.*

²⁵⁹ U.S. Representative Robert C. Scott Testimony, *Subminimum Wages Briefing*, p. 22.

inequitable program over a six-year period and would provide funds to ensure individuals and the organizations they work for can successfully phase out Section 14(c) certificates.”²⁶⁰

U.S. Senator Maggie Hassan (D-NH) submitted a public comment to the Commission about the Transformation to Competitive Employment Act.²⁶¹ Senator Hassan is the former Governor of New Hampshire, who signed into law her state bill eliminating subminimum wages, which she states was supported by disability advocates as well as business leaders.²⁶² Senator Hassan wrote that “it is imperative that the federal government eliminate this antiquated and unjust practice of paying individuals who experience disabilities less than their peers.”²⁶³ Her bill would include supports because she believes that:

As a country, we must make the necessary investments in services so that individuals who have worked at these workshops have the opportunity and support necessary to achieve competitive integrated employment. That is why in the U.S. Senate I am a cosponsor of the Transformation to Competitive Employment Act that would phase out the payment of subminimum wages nationally and provide funding so that individuals who have been employed at sheltered workshops receive the necessary supports to transition to competitive integrated employment.²⁶⁴

The Transformation to Competitive Employment Act would authorize the Secretary of Labor to issue grants to states to assist 14(c) certificate holders in transitioning to a model of employment for people with disabilities centered on competitive integrated employment.²⁶⁵ States would have the ability to apply for grants from the federal government ranging from \$2,000,000 to \$10,000,000.²⁶⁶ Any state interested in receiving a grant would be required to submit an application to the Department of Labor for consideration with information about local 14(c) programs, and any state receiving a grant would be required to commit to a phase-out of all 14(c) certificates in the state over a six-year period.²⁶⁷ Under the proposed legislation, individuals with the most significant intellectual and developmental disabilities would be given priority in receiving necessary supports and services to succeed during and after the transition.²⁶⁸ Each state receiving a grant would be required to create an advisory council consisting of various stakeholders to

²⁶⁰ U.S. Representative Cathy McMorris Rodgers, Written Statement for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights, Nov. 15, 2019, at 1.

²⁶¹ U.S. Senator Margaret Wood Hassan, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ Transformation to Competitive Employment Act, S. 260/H.R. 873 § 101, 116th Cong. (2019).

²⁶⁶ *Id.* at § 102(e).

²⁶⁷ *Id.* at § 102.

²⁶⁸ *Id.*

monitor and guide the transition,²⁶⁹ and least 25 percent of the advisory council members would have to be people with disabilities.²⁷⁰

The Act would also assist current 14(c) employers in the transition to competitive integrated employment.²⁷¹ The application to receive a federal grant would include a description of how the applicant would provide competitive integrated employment to people with disabilities, including a description of evidence-based integrated services.²⁷² A projection of how many people with disabilities will be employed after the transition to competitive integrated employment and the date upon which the entity will discontinue the use of its 14(c) certificate would also be required. Finally, the applicant would be required to explain how the entity will coordinate with federal, state, and local programs and agencies to facilitate the transition to competitive integrated employment for people with disabilities.²⁷³ Grants to 14(c) certificate holders would be for a period of three years,²⁷⁴ and for awards between \$100,000 and \$500,000,²⁷⁵ in partnership with at least two entities with experience providing support with individuals with disabilities in competitive integrated employment.²⁷⁶

The Act would also provide for the gradual phase out of 14(c) certificates by prohibiting the issuance of any new certificates after the Transformation to Competitive Employment Act is enacted by Congress.²⁷⁷ Any previously issued, existing 14(c) certificates would be invalidated six years after the date of enactment.²⁷⁸

Federal technical assistance to states and entities to facilitate the transition of people with disabilities from employment under 14(c) certificates to competitive integrated employment would also be provided.²⁷⁹ The Act would also require the Secretary of Labor to enter into a contract with a nonprofit entity no later than six months after the enactment to conduct a multi-year evaluation on the impacts, including changes in wages and employment,²⁸⁰ including the number of employees with disabilities who have transitioned from subminimum wage employment to

²⁶⁹ *Id.* at § 102(a)(2)(E)(vii).

²⁷⁰ *Id.* at § 102(a)(3)(A).

²⁷¹ *Id.* at § 103.

²⁷² *Id.* at § 103(b).

²⁷³ *Id.*

²⁷⁴ *Id.* at § 103(e).

²⁷⁵ *Id.* at § 103(g).

²⁷⁶ *Id.* at § 103(h)(2).

²⁷⁷ *Id.* at § 202.

²⁷⁸ *Id.* at § 202.

²⁷⁹ *Id.* at § 301.

²⁸⁰ *Id.* at § 401(a)(1).

competitive integrated employment.²⁸¹ At the time of this writing, the bill awaits further consideration in the U.S. House of Representatives and U.S. Senate.²⁸²

During the Commission’s briefing, several panelists raised continued concerns about the continued existence of the 14(c) program, specifically with regard to sheltered workshops. As Finn Gardiner of the Lurie Institute at Brandeis University noted, “sheltered workshops have not increased employment prospects among autistic workers or workers with intellectual disabilities.”²⁸³ Gardiner also stated that:

Opposition to segregated work environments and subminimum wages is nothing new: nearly sixty years ago, the founder of the National Federation for the Blind, Jacobus tenBroek, wrote an article called “The Character and Function of Sheltered Workshops.” In this piece, he directly likened sheltered workshops to prisons and other institutions that are designed to keep designated groups away from the rest of society, rather than integrating them as full members. In 2011, the National Disability Rights Network produced a report, *Segregated and Exploited*, that identified some of these power dynamics and ways that policymakers could redress these inequities.

This is borne out by research data: a 2009 study about disability and employment found that people who acquired disabilities as adults, or received diagnoses for lifelong disabilities later in life, had fewer doubts about their competence as workers because they did not internalize stereotyping during childhood.²⁸⁴

John Anton of the Massachusetts Down Syndrome Congress testified to the Commission about his experience working for subminimum wages, stating that:

I attended the local sheltered workshop which had a [14(c)] waiver. They had us doing jobs such as packing items, piecework. It was very boring and unsatisfying for me. My friends would be sitting around playing cards, watching videos, and hanging out with nothing to work on.

²⁸¹ *Id.* at § 402(1)-(4).

²⁸² See, Congress.gov, *Actions Overview S.260 — 116th Congress (2019-2020)*, <https://www.congress.gov/bill/116th-congress/senate-bill/260/actions?KWICView=false> (last accessed May 29, 2020); Congress.gov, *Actions Overview H.R.873 — 116th Congress (2019-2020)*, <https://www.congress.gov/bill/116th-congress/house-bill/873/actions?KWICView=false> (last accessed May 29, 2020).

²⁸³ Finn Gardiner Testimony, *Subminimum Wage Briefing*, p. 137.

²⁸⁴ Finn Gardiner, Communications Specialist, Lurie Institute for Disability Policy, Brandeis University, Written Statement for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights, Nov. 15, 2019, at 2 (hereinafter Gardiner Statement) (internal citation omitted).

In addition, I got paid very little for the work. It was only a few dollars a week sometimes. I went to the supervisor and said I wanted to do something more challenging. He told me it was not possible. So I quit.²⁸⁵

Kate McSweeney, Vice President of Government Affairs and General Counsel of ACCSES, testified to the Commission that efforts to abolish subminimum wages are misguided and are not considering the job prospects of people with disabilities after subminimum wages are abolished, stating that:

It is a significant concern that so many federal and state entities are looking at 14(c), because few are looking at it through the right lens. It is easy to be high minded about someone else's job – but before getting rid of a valuable, viable work option for people who want that choice, please have an understanding of what that job means to the person and what losing that opportunity will mean for them.²⁸⁶

McSweeney also testified to the value that Community Rehabilitation Programs offer to people with disabilities in finding and maintaining employment, stating that:

The value of a job in or through [Community Rehabilitation Program]-run work centers that provide employment opportunities and training cannot be overstated. In short, if [Community Rehabilitation Programs] and the jobs they provide were eliminated, they would have to be reinvented. The network of [Community Rehabilitation Programs] across this country, staffed by people with substantial knowledge and extensive experience, are a vital component of providing and maintaining work opportunities for people with the most significant disabilities. [Community Rehabilitation Programs] will play a major role in future disability policy, too, because there can be no growth without them. [Community Rehabilitation Programs] not only provide training, work opportunities, transportation, and job supports, they also work with the people they serve to provide supported employment and job coaches in competitive jobs.²⁸⁷

At the Commission's briefing, Congressman Grothman (R-WI) testified that he represents 10 counties that have active 14(c) work centers.²⁸⁸ Grothman testified that he has toured 11 sheltered workshops in Wisconsin, and that it is very important to tour them.²⁸⁹ He opined that:

²⁸⁵ John Anton Testimony, *Subminimum Wages Briefing*, pp. 127-128.

²⁸⁶ Kate McSweeney, Vice President Government Affairs and General Counsel, ACCSES, Written Statement for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights, Nov. 15, 2019, at 4 (hereinafter McSweeney Statement).

²⁸⁷ McSweeney Statement, at 4-5.

²⁸⁸ Congressman Grothman Testimony, *Subminimum Wages Briefing*, p. 255.

²⁸⁹ *Ibid.*

There are tremendous things to look at because you see people who most of us would think of have been dealt a tough lot in life, and they're smiling and happy and proud to have lives like their siblings and friends—to go to work every day, to earn a paycheck, use that.

Usually they're subsidized in other ways because they have different abilities[.] But we have SSI or SSDI programs, so they don't have to earn enough to pay for a \$700-a-month apartment or anything like that.²⁹⁰

Congressman James Sensenbrenner (R-WI) wrote a letter to the Commission stating that:

Section 14(c) certificates are utilized by Community Rehabilitation Programs who provide exceptional work environments and ample opportunities for Americans with disabilities to gain dignified employment opportunities. These are individuals who are typically otherwise left out of the workforce and are unable to fulfill the requirements necessary to achieve standard employment opportunities. It is imperative that Section 14(c) is maintained so individuals with disabilities have options and access to employment opportunities to maintain the quality of life that every American deserves. Without it, I fear that [Community Rehabilitation Programs] will close their door and thousands of individuals with disabilities will be out of work.²⁹¹

Representative Vicky Hartzler (R-MO) also wrote to the Commission, stating that:

These sheltered workshops serve as steppingstones. For some, a job at a workshop is their only opportunity to gain work experience in order to seek competitive employment. For others, sheltered workshops assist in training and preparing those employees who want to seek competitive employment as well as providing income and job satisfaction to individuals preferring to continue extended employment.²⁹²

During the open public comment session following the Commission's briefing, the Commission heard testimony from Linda Hau, whose son works at a 14(c) workshop in Wisconsin.²⁹³ Hau stated that “[s]heltered workshops have allowed those loved ones to work in an environment where they feel safe, loved and accepted, while having the pride of holding a paying job,” and “[w]e have also learned that inclusion is often the cruelest form of isolation.”²⁹⁴ Hau testified that the financial and societal costs of ending the 14(c) certificate program will be too high, stating that:

²⁹⁰ Ibid.

²⁹¹ U.S. Representative F. James Sensenbrenner, Written Statement for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights, Dec. 14, 2019.

²⁹² U.S. Representative Vicky Hartzler, Written Statement for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights, Dec. 12, 2019.

²⁹³ Hau Testimony, *Subminimum Wages Briefing*, p. 339.

²⁹⁴ Ibid.

If we lose our chosen workplaces, it will leave our loved ones faced with forced community employment at a taxpayer cost of \$40 per hour for a job coach, day service at a cost of \$10 per client, per hour, or simply no employment, which would require residential services at varying costs.

Many of these individuals are unable to function in a typical workplace due to behavioral, medical, or physical limitations. They are generally socially ostracized, as they have nothing in common with their coworkers.²⁹⁵

The National Council on Disability explained the concern that 14(c) repeal would eliminate vital employment for people with disabilities in its 2018 report recommending such repeal:

Opponents of eliminating the use of 14(c) certificates frequently argue that 14(c) employers would not be able to employ the people with disabilities that they do at minimum wages or above without going out of business. Several national experts and numerous employment providers that we spoke with, reflecting upon this assertion, stated that it is an acknowledgment that, even with substantial set aside contracts and federal, state, and local funding, the workshop business model is largely unsustainable unless people are paid subminimum wages. Or, plainly stated, subminimum wage is not a bug of the workshop model, it is its primary feature.²⁹⁶

As several experts testified to the Commission, 14(c) repeal would not require the elimination of Community Rehabilitation Programs.²⁹⁷ Most federal and state funding available to Community Rehabilitation Programs to provide services to individuals with disabilities disincentivizes the payment of subminimum wages, either directly, as requirements that vocational rehabilitation funding be used for “competitive integrated employment,” or indirectly, as with Medicaid requirements for integrated services, as many 14(c) workshops are also sheltered. Annual federal funding for services for people with disabilities for two funding sources specifically tied to employment (AbilityOne²⁹⁸ and the Rehabilitation Act²⁹⁹), amounts to just over \$6 billion, while

²⁹⁵ Ibid., p. 340.

²⁹⁶ Nat’l Council on Disability, National Disability Employment Policy, *From the New Deal to the Real Deal: Joining the Industries of the Future*, pp. 52-53 (Oct. 2018).

²⁹⁷ See Ridge Testimony, Briefing Transcript at p. 184-85, Mathis Testimony, Briefing Transcript at p. 200-04, Christensen Testimony, Briefing Transcript at p. 207-211, Teninty Testimony at p. 216-17, Musheno Public Comment, Briefing Transcript at p. 346.

²⁹⁸ U.S. AbilityOne Commission, *Fiscal Year 2017 Performance and Accountability Report*, p. 3, <https://abilityone.gov/commission/documents/U.S.percent20AbilityOne.percent20Commission.percent20FY.percent202017.percent20PAR-Final.pdf>.

²⁹⁹ See Department of Education, Rehabilitation Services, Fiscal Year 2020 Budget Request, <https://www2.ed.gov/about/overview/budget/budget20/justifications/i-rehab.pdf>.

Medicaid Home and Community Based Services, which provides for services regardless of employment status, is annually funded at over \$90 billion.³⁰⁰

As Governor Tom Ridge explained:

There are some well-intentioned advocates that express concern that the elimination of 14(c) would severely limit opportunities for new Americans with disabilities, who may use these workshops as both a place for meaningful social intervention and a respite for caregivers. We understand these concerns, but remind them that there are other options available. 14(c) is not a funding program, it is a certificate. Federal funding will still be available to support individuals with disabilities in other ways.³⁰¹

Raising Subminimum Wages Over Time

Some advocates propose gradually raising the subminimum wage until it meets the federal minimum wage. The Raise the Wage Act that passed the U.S. House of Representatives on July 18, 2019³⁰² awaits further consideration by the Senate. The main purpose of this bill is to gradually raise the federal minimum wage to \$15 an hour over a period of six years after the effective date of the bill,³⁰³ and the bill also contains provisions for the gradual phase out of subminimum wages paid to people with disabilities by raising the minimum allowed wage paid under a 14(c) certificate over a period of six years.³⁰⁴ The eventual minimum wage for people with disabilities would be the same as the minimum wage for all workers employed in the United States at the end of the six year period.

Congressman Scott, the House sponsor of the Raise the Wage Act, testified that: “This bill also ensures that all covered workers will make the full minimum wage. The Raise the Wage Act gradually phases out the 14(c) subminimum wage for the, in the Fair Labor Standards Act.”³⁰⁵

U.S. Senator Patty Murray (D-WA) wrote to the Commission about the Raise the Wage Act. In her letter to the Commission, Senator Murray described the policy reasons for phasing out 14(c), and the benefits that people with disabilities stand to gain by engaging in competitive integrated employment, stating that:

We must immediately move away from Section 14(c) and toward [competitive integrated employment] for all workers with disabilities. Research demonstrates that through

³⁰⁰ Steve Eiken, Kate Sredl, Brian Burwell, and Angie Amos, Medicaid Expenditures for Long-Term Services and Supports in FY 2016 (IBM Watson Health, 2018).

³⁰¹ Ridge Testimony, Briefing Transcript, p. 184.

³⁰² Raise the Wage Act, S. 105/H.R. 582, 116th Cong. (Introduced in the U.S. Senate on Jan. 16, 2019, passed the U.S. House of Representatives on July 18, 2019).; U.S. House of Representatives Roll Call Vote No. 496, 116th Cong. (July 18, 2019), <http://clerk.house.gov/evs/2019/roll496.xml>.

³⁰³ Raise the Wage Act, S. 105/H.R. 582 § 2, 116th Cong.

³⁰⁴ Raise the Wage Act, S. 105/H.R. 582 § 6(a)(1), 116th Cong.

³⁰⁵ U.S. Representative Robert C. Scott Testimony, *Subminimum Wages Briefing*, p. 14.

supported employment, workers with disabilities can be placed in [competitive integrated employment] that better matches their skills and interest in less time and in a more efficient manner than it takes to train a worker with a disability for a job in a sheltered workshop with skills that are unlikely to be used in a different setting. Additionally, [competitive integrated employment] has many positive benefits outside of work, including more community engagement for the worker, higher job satisfaction, and greater independence. Our fundamental premise regarding workers with disabilities must shift to one that believes and expects that all people are capable of work, with appropriate accommodations and modifications, and deserve a uniform and nondiscriminatory minimum wage.³⁰⁶

The Raise the Wage Act includes provisions that mirror provisions of the Transformation to Competitive Employment Act. The Raise the Wage Act would prohibit issuance of any new 14(c) certificates and any previously issued, existing 14(c) certificates would cease to be effective six years after the enactment.³⁰⁷ The Act would also direct the Secretary of Labor to provide technical assistance upon request to employers issued a 14(c) certificate for the purposes of transitioning employees with disabilities to competitive integrated employment, and for providing information to individuals earning a subminimum wage including referrals to appropriate federal and state entities with experience in competitive integrated employment.³⁰⁸ However, the Raise the Wage Act does not provide grants or other financial assistance.³⁰⁹

At the Commission's briefing, several panelists raised the concern that current proposals in Congress will force employers to pay people with disabilities and do not take into account whether employers have the financial capacity to pay people with disabilities minimum wage or above. Congressman Grothman provided testimony stating that one Community Rehabilitation Programs was serving 500 people with disabilities when operating under a 14(c) certificate, but after transitioning away from subminimum wages, was only able to serve 65 people.³¹⁰ Grothman also testified that while he knows of no studies about the potential negative impact of the Act:

Common sense will tell you, study or not, that if you go up from \$7.50 an hour to \$15 an hour at the same time you get rid of 14(c), it's going to be devastating to the disability community. And people know exactly what they're doing, because we tried to amend it out.

³⁰⁶ U.S. Senator Patty Murray, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights (citations omitted).

³⁰⁷ Raise the Wage Act, S. 105/H.R. 582 § 6(a)(2), 116th Cong.

³⁰⁸ *Id.* at § 6(a)(2)(8).

³⁰⁹ *See generally*, Raise the Wage Act, S. 105/H.R. 582 § 6, 116th Cong.

³¹⁰ U.S. Representative Glenn Grothman, Written Statement for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights, Nov. 15, 2019, at 3. (hereinafter Grothman Statement).

In that minimum wage bill today, which depends on what happens politically in the next election, if the people who pushed that bill get what they want, it's \$15 for disabled people. And I think it's just going to be devastating for them.³¹¹

Michele Ford, Chief Executive Officer of Inroads to Opportunities, a Community Rehabilitation Program, also testified at the Commission's briefing about the difficulties posed by raising wages:

[W]e in New Jersey continue to try, community rehabilitation programs continue to try to brainstorm, and grow, and think of different ways to help people to become employed. But I know there is a huge concern because we are on our way to the \$15 minimum wage. And already we are seeing our employment numbers, we have gone from, I guess, \$8.84 to \$10.00 in July. We're going to \$11.00 in January. And we are already seeing more difficult times with our employment folks getting people employed.³¹²

Congressman James R. Langevin (D-RI) wrote to the Commission in support of the Raise the Wage Act and elimination of subminimum wages for people with disabilities. He explained his view that allowing the continuation of the 14(c) program is detrimental to people with disabilities, stating:

By allowing individuals with disabilities to be paid less than their able-bodied counterparts, the law assumes that such individuals are not capable of full employment. This narrative reinforces negative stereotypes and is blatantly false.....Individuals with disabilities should be afforded equal opportunity, full community participation, and economic self-sufficiency.³¹³

With respect to providing minimum wages, some employers have done so without federal assistance. At the Commission's briefing, Brian Collins, Senior Manager at Microsoft, testified that:

Microsoft does not pay less than the applicable minimum wage. We require our suppliers to do the same because we believe in fair wages for all. In July 2019, additional language was added to our supplier code of conduct to reconfirm the obligation to pay at least applicable minimum wage to everyone: Employment of people with disabilities, including those with intellectual disabilities, is the right thing to do, and it's a business imperative. It's good for the bottom line. Research shows that companies that champion disability inclusion are more profitable.³¹⁴

³¹¹ U.S. Representative Glenn Grothman Testimony, *Subminimum Wages Briefing*, p. 309.

³¹² Ford Testimony, *Subminimum Wages Briefing*, pp. 125-126.

³¹³ U.S. Representative James R. Langevin, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

³¹⁴ Brian Collins, briefing transcript at 274-75.

Collins further explained Microsoft’s philosophy behind its initiative to hire more people with disabilities, stating that “we believe that people with disabilities are a strength for our company, and a talent pool that adds not just diversity, but expertise that make our products, our services, and our culture better.”³¹⁵ Since 2013, Microsoft’s Supported Employment Program has helped over 280 people with intellectual and developmental disabilities find jobs at Microsoft campuses worldwide.³¹⁶ Collins stated that employing people with intellectual and developmental disabilities in integrated jobs at competitive wages and employer benefits aligns with Microsoft’s “mission to empower everyone, and our values of inclusion.”³¹⁷ Further, the program targets those who may have been most excluded, as the mission of the program is “to make a substantial difference in the lives of people with intellectual and developmental disabilities who have historically been overlooked in the jobs market.”³¹⁸

Collins explained how people with disabilities have contributed to Microsoft, stating that:

People with disabilities are a strength. There are many examples of employees with disabilities who are more loyal, reducing the cost of turnover, the cost of recruitment, and the cost of onboarding. We’ve seen employees with disabilities who are more innovative. They challenge the status quo. They invent inclusive solutions. We’ve seen employees with disabilities teaching their colleagues about communication, inclusion, and empathy.³¹⁹

Federal Tax Credits or Other Federal Funding

Proponents of encouraging alternative employment options to 14(c) have also proposed leveraging current federal funding supporting persons with disabilities or increasing such funding or tax credits. This approach differs from the Transformation to Competitive Employment Act in that it encourages employers and service providers to seek community employment at minimum wage or above for people with disabilities while preserving 14(c) employment as an option. For example, the Disability Employment Incentive Act, introduced in 2019, does not seek to end or phase out the use of 14(c) certificates to employ people with disabilities at subminimum wages. Instead, it proposes to increase the work opportunity credit available through Social Security Disability Insurance by amending the Internal Revenue Code to fund opportunity credits for vocational rehabilitation referrals.³²⁰ The Act provides an incentive for employers to hire people with disabilities who are referred from a vocational rehabilitation agency.³²¹ The hiring entities are offered a tax credit defraying some of the hiring entity’s tax liability in exchange for the hiring of a

³¹⁵ Collins Testimony, *Subminimum Wages Briefing*, p. 272.

³¹⁶ *Ibid.*, 272-73.

³¹⁷ *Ibid.*, 274.

³¹⁸ *Ibid.*, p. 274.

³¹⁹ *Ibid.*, p. 276.

³²⁰ Disability Employment Incentive Act, S. 255/H.R. 3992 § 3, 116th Cong. (Introduced in the U.S. Senate on Jan. 29, 2019, and in the U.S. House of Representatives on July 25, 2019).

³²¹ *Id.*

person with a disability referred by a vocational rehabilitation agency.³²² This model is similar to other models, such as AbilityOne, which relies on the employee's Medicaid funding in order to provide supports needed to employ them at minimum wage.³²³ These models take into account that some persons with disabilities may need supports for their employment, or assistance in learning skills and finding jobs.

The proposed federal Disability Employment Incentive Act would also expand the available tax deduction for the removal of architectural and transportation barriers by allowing deductions for improvements to internet and telecommunications operations and raising the deduction limit from \$15,000 to \$30,000.³²⁴ The Commission received a letter from Congressman Emanuel Cleaver (D-MO) stating that transportation was unavailable to persons with disabilities in the rural parts of Missouri, except through 14(c) employers.³²⁵ Several of the employees with disabilities interviewed in the Commission Subcommittee's site visits in both Virginia and Vermont stated that accessible public transportation was a problem limiting their employment opportunities, and that employer-provided transportation was a useful assistance to them.³²⁶

At the Commission's briefing, panelists testified about similar alternatives to 14(c) employment that have proven successful not only for employees, but also, profits. For example, Carol Ann DeSantis, Chief Executive Officer of Melwood, an AbilityOne program contractor, explained in written testimony to the Commission that Melwood voluntarily gave up its 14(c) certificate and now pays all of its employees minimum wage or above.³²⁷ When DeSantis testified before the Commission in November 2019, the average wage for a worker with disabilities at Melwood was \$15.68 per hour.³²⁸ Melwood's employees are all entitled to employee benefits such as health insurance and retirement contributions.³²⁹ Melwood is a non-profit organization with the mission of employing people with disabilities in the areas of "janitorial, recycling, warehousing, logistics, fulfillment, administrative and office services, building and facilities operations and management, and others."³³⁰ In her testimony to the Commission, DeSantis explained how requirements of the 14(c) program, such as time studies, negatively impacted Melwood's employees with disabilities: "time trials caused our employees to feel extremely anxious and stressed, as employees knew that their performance could reduce their wages and harm their ability to live happy independent

³²² *Id.*

³²³ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities," U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 138-139.

³²⁴ Disability Employment Incentive Act, S. 255/H.R. 3992 § 5, 116th Cong. (Introduced in the U.S. Senate on Jan. 29, 2019, and in the U.S. House of Representatives on July 25, 2019).

³²⁵ U.S. Representative Emanuel Cleaver, II, Written Statement for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights, Dec. 15, 2019, at 1.

³²⁶ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities," U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 165, 200, 204, and 206.

³²⁷ DeSantis Statement, at 4.

³²⁸ Carol Ann DeSantis, Testimony, *Subminimum Wages Briefing*, p. 211.

³²⁹ *Ibid.*

³³⁰ DeSantis Statement, at 1.

lives.”³³¹ Furthermore, “the average employee lost five hours of productive time as a result of each time trial, not including the loss of productivity due to the anxiety distraction.”³³²

In January 2016, DeSantis recommended to Melwood’s board of directors that the agency phase out payment of subminimum wages and relinquish its 14(c) certificate.³³³ Since then, Melwood has grown from a \$90 million organization to a \$110 million organization.³³⁴ DeSantis explained how paying people with disabilities above the minimum wage has made a positive impact on Melwood’s business and the community:

We increased employee morale and employee satisfaction, and we now operate at more than 60 contract sites in Maryland, D.C., and Virginia, and soon, North Carolina, as we continue to develop new business opportunities and serve even more people.

According to the 2017 Melwood economic impact report, Melwood workers of differing abilities earned more than \$27.7 million in wages and paid approximately \$6 million in federal, state, and local taxes.

Through their spending in their communities, Melwood’s workers have generated an additional 135 jobs in other businesses in the region, for a total induced economic output of nearly \$19 million in the [Washington, DC, Maryland, and Virginia region]. In 2017, Melwood’s employees with disabilities earned a combined \$27.7 million in wages and paid approximately \$6 million in taxes.³³⁵

Employment First Initiatives

In recent years, the federal government has prioritized integrated support services for people with disabilities, as indicated in part by Congress including a mandate in the Americans with Disabilities Act that people with disabilities receive services, including employment services, in the most integrated setting possible.³³⁶ One way the federal government has attempted to promote integration of people with disabilities is through an Employment First model regarding employment and employment services for people with disabilities.³³⁷ The Department of Labor’s

³³¹ Carol Ann DeSantis, Testimony, *Subminimum Wages Briefing*, p. 209.

³³² *Ibid*; see *supra* notes 65-71 (discussing legal requirements for time trials).

³³³ Carol Ann DeSantis, Testimony, *Subminimum Wages Briefing*, p. 211.

³³⁴ *Ibid*.

³³⁵ *Ibid.*, 212.

³³⁶ 42 U.S.C. § 12132; see also *supra* notes 122-125 (discussing the ADA’s integration mandate); see generally, 29 U.S.C. § 723 (as amended by the Workforce Innovation and Opportunity Act Pub. L. 113-128, 128 Stat. 1425 (2014)); and, U.S. Comm’n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* at 48 (1983) <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11081.pdf> (discussing how the Rehabilitation Act of 1973 funded efforts to assist people with disabilities to achieve community living, including community employment).

³³⁷ Office of Disability Employment Policy, *Employment First*, <https://www.dol.gov/odep/topics/EmploymentFirst.htm> (Last visited Apr. 1, 2020).

Office of Disability Employment Policy defines Employment First as “a framework for systems change that is centered on the premise that **all** citizens, including individuals with significant disabilities, are capable of full participation in integrated employment and community life.”³³⁸ The Wage and Hour Division stated in response to agency review of the Commission’s draft report that, since 2012, the Office of Disability Employment Policy has provided targeted support and technical assistance to 27 states to help align policy and funding to increase competitive integrated employment opportunities within an Employment First framework.³³⁹ Moreover, since 2017 the Office of Disability Employment Policy expanded policy assistance to service providers that hold Section 14(c) certificates to help them move toward competitive integrated employment, and more than 300 providers have participated nationally.³⁴⁰ In addition, all 50 states and more than 2,700 state representatives and stakeholders participate in the Office of Disability Employment Policy’s Employment First Community of Practice to share strategies.³⁴¹ Also, the Department of Labor’s Employment and Training Administration, Civil Rights Center, and the Office of Disability Employment Policy have worked to increase the accessibility of American Job Centers and the ability of the public workforce system to serve individuals with significant disabilities.³⁴² In addition, the Office of Disability Employment Policy has recently launched its National Expansion of Employment Opportunities Network initiative.³⁴³ The effort aims to increase competitive integrated employment for people with disabilities by working directly with national provider organizations.³⁴⁴ The selected organizations will each receive intensive policy consulting, technical support, and peer mentoring to strengthen their service provider network’s capacity to help workers with disabilities prepare for and obtain competitive integrated employment.³⁴⁵ In the National Expansion of Employment Opportunities Network initiative’s first year, the national provider organization will work with subject matter experts to develop an action plan to guide work in future years, and each national provider organization will also receive support to help five of their Local Provider Organization members develop individual action plans for increasing competitive integrated employment opportunities for the individuals they serve.³⁴⁶

In her testimony to the Commission, Regina Kline explained how the ADA presumes that all people can work in community environments, stating that:

It is axiomatic, under the ADA, that the mainstream work environment may have barriers that can be removed with accommodations, if it is reasonable and not an undue burden for

³³⁸ Office of Disability Employment Policy, *Employment First*, <https://www.dol.gov/odep/topics/EmploymentFirst.htm> (Last visited Apr. 1, 2020) (emphasis in original).

³³⁹ Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (on file).

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*

the employer to do so. Meaning, under the ADA, a barrier—not the person with a disability—should be removed from the work environment. Likewise, the Rehabilitation Act of 1973 (“Rehab Act”) and corresponding vocational rehabilitation system has long recognized that some people may need individualized supports, in addition to those that would be reasonable for an employer to provide, for the purpose of removing additional barriers on the job in the mainstream market.³⁴⁷

Alison Barkoff of the Center For Public Representation explained that the dialogue surrounding payment of subminimum wages should be centered on rights granted by federal law, including that people with disabilities have the right under the ADA to receive services in “the most integrated setting.”³⁴⁸ Barkoff further emphasized that “Federal courts have consistently and uniformly rejected attempts to reinterpret the ADA to mean a right to a choice of segregated settings,” and have held instead that people with disabilities should have the right to employment in an integrated setting.³⁴⁹

Many states across the country have adopted “Employment First” initiatives that emphasize that integrated employment in community settings for wages at or above the minimum wage should be the first preferential outcome when offering employment services to people with disabilities.³⁵⁰ Employment First begins with the presumption that all people can work in competitive integrated employment settings, regardless of ability.³⁵¹ As Jennifer Mathis explained in her testimony, “Employment First policies [recognize] that competitive integrated employment should be the default option for people with disabilities.”³⁵² The Department of Labor’s Office of Disability Employment Policy also explains how states that have adopted Employment First policies change their practices, as follows:

Under this approach, publicly-financed systems are urged to align policies, service delivery practices, and reimbursement structures to commit to integrated employment as the priority

³⁴⁷ Regina Kline, Partner, Brown, Goldstein & Levy, Written Statement for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights, Nov. 15, 2019, at 2. (hereinafter Kline Statement).

³⁴⁸ Alison Barkoff, Supplemental Testimony to USCCR at 3; 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d).

³⁴⁹ Alison Barkoff, Supplemental Testimony to USCCR at 3 (discussing *Illinois League of Advocates for Developmentally Disabled v. Quinn*, 2013 WL 3168758, at *5 (N.D. Ill. 2013), *aff’d* 803 F.3d 872 (7th Cir 2015); *Sciarrillo v. Christie*, 2013 WL 6586569 (D.N.J. Dec. 13, 2013)); *see also* *See* Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 92. (discussing public comments highlighting choice).

³⁵⁰ SELN, *Employment First Resource List* at 1 (April 2019) <http://static.smallworldlabs.com/umass/content/SELN percent20Employment percent20First percent20resource percent20list-spring-2019.pdf>.

³⁵¹ Association of People Supporting Employment First, *APSE Fact Sheet: Employment First* at 1, <https://www.apse.org/wp-content/uploads/docs/Employment percent20First percent20- percent20Legislator percent20Fact percent20Sheet.pdf>.

³⁵² Mathis Testimony, *Subminimum Wages Briefing* pp. 191-92.

option with respect to the use of publicly-financed day and employment services for youth and adults with significant disabilities.³⁵³

States that have adopted Employment First policies have committed to prioritizing competitive integrated employment for people with disabilities over other employment options such as sheltered employment in 14(c) workshops.³⁵⁴ When a state adopts Employment First as statewide policy, it does not necessarily mean that the state has prohibited the payment of subminimum wages or the use of 14(c) certificates within the state.

As of January 2020, 38 states have adopted Employment First policies in some form aimed at increasing employment opportunities for people with disabilities.³⁵⁵ Of those 38 states, 23 have passed legislation that formally made integrated employment outcomes the preferred state policy for people with disabilities.³⁵⁶ 17 states plus DC have enacted Employment First policies by executive order or directive.³⁵⁷ The remaining 10 states may have Employment First established as state policy by a state agency that serves people with disabilities, but do not have any executive action or legislation.³⁵⁸

Figure 1.1 shows which states have enacted differing levels of Employment First policies as of January 2020, and whether those states have active or pending 14(c) certificates, are phasing out 14(c), or do not currently have any 14(c) certificate holders in the state.

³⁵³ U.S. Dep’t of Labor, Office of Disability Employment Policy, *Employment First*, <https://www.dol.gov/odep/topics/employmentfirst.htm> (last accessed Feb. 14, 2020).

³⁵⁴ See, e.g. Ariz. Exec. Order No. 2017-08, “The Establishment of Arizona as an Employment First State” (Nov. 15, 2017) https://azgovernor.gov/sites/default/files/executive_order_2017-08_employment_first_state_0.pdf. (“Arizona seeks to improve and coordinate efforts to increase community employment opportunities for Arizonans who have disabilities,” but “[n]othing in this Order shall be construed to limit the ability of a person who has a disability to select an employment option that they determine to be the best option for themselves”).

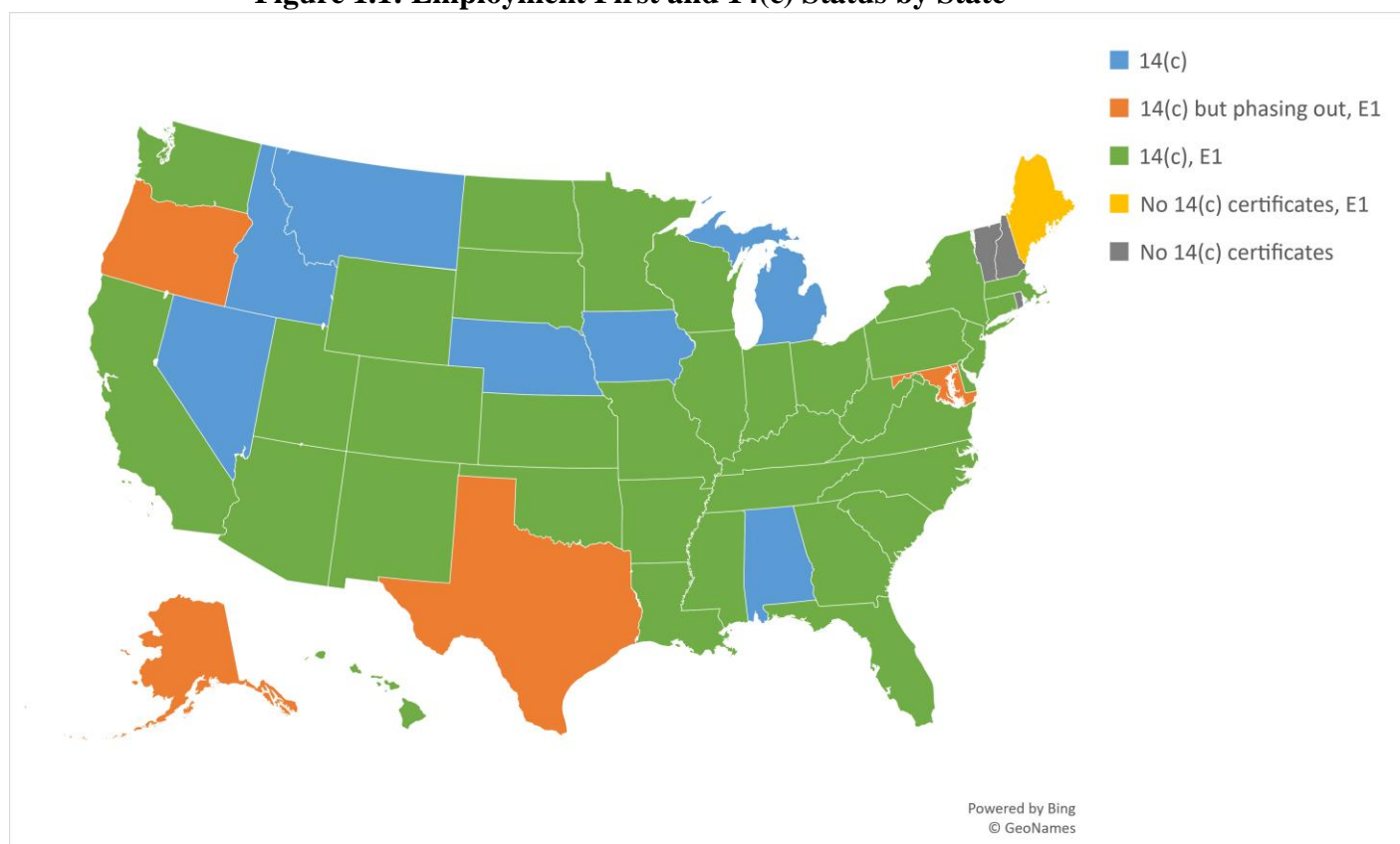
³⁵⁵ Association of People Supporting Employment First, *Employment First Map*, Jan. 2020 <https://apse.org/employment-first-map/>.

³⁵⁶ Ibid.

³⁵⁷ Ibid.

³⁵⁸ Ibid.

Figure 1.1: Employment First and 14(c) Status by State



Source: Association of People Supporting Employment First, *Employment First Map*, <https://apse.org/employment-first-map/>, and Commission Research, Figure Generated by Commission Staff.

A 2013 report from the National Governors Association recommended strategies for how state executives could bring Employment First policies to their states and make the employment of people with disabilities a central tenet of state workforce development strategies, including through executive orders and the introduction of legislation.³⁵⁹ Furthermore, the Association stated governors can encourage Employment First initiatives by directing state agencies to better include people with disabilities in economic development programs, and through better tracking of employment outcomes for people with disabilities, and through encouraging the development of public-private partnerships.³⁶⁰

Michele Ford of Inroads to Opportunities testified about the impact that a state shifting to an Employment First policy can have on Community Rehabilitation Programs in that state, sharing that:

³⁵⁹ National Governors Association, *A Better Bottom Line: Employing People with Disabilities* at 5 (2013) https://askearn.org/wp-content/uploads/docs/nga_2013_better_bottom_line.pdf.

³⁶⁰ *Ibid.*

In 2012, New Jersey became an Employment First state. Some programs funded through Medicaid and serving individuals with developmental disabilities that were previously working with commensurate wages no longer do it. They stopped. So, we kind of have a unique situation. We have half of programs still operating under 14(c) under the state and [New Jersey Division of Vocational Rehabilitation Services], and the programs funded through Medicaid, and specifically [I/DD] clients not doing it any longer.

But we have seen, my sister agencies, a growth in day programming, meaning day habilitation, people in the development world are going to day programs more often than not.³⁶¹

Ford also explained some of the challenges in supporting people with disabilities in integrated employment, and one of the initiatives that Inroads to Opportunities has taken in recent years to employ people with disabilities in an integrated setting, opining that:

I think the struggle is finding employers. That's a huge thing that I haven't heard. It's about engagement, people wanting to work. But the employer pool is very, very difficult. Doing employment is very, very difficult. And we have a lot of individuals always looking for work; we don't always have employers willing to work with us.

So, I think that really is a very, very serious issue.

Many other agencies in our state, including us, have had to develop social enterprises and different business models to try to help create new opportunities for job seekers. So, we have a café which is regular, it's competitive, it's integrated in the community, and we use that a lot of times to help trial to give people experience, you know, to get an understanding. And they work in that bakery café.³⁶²

Enhancing 14(c)

The Commission also received some information indicating that the existing protections of Section 14(c) could be enhanced, rather than eliminating the entire program. For example, in Missouri, the state Department of Education is required to evaluate and certify for each individual entering a 14(c) program that such placement is appropriate; this, advocates say, helps ensure that placement

³⁶¹ Michele Ford Testimony, *Subminimum Wages Briefing*, pp. 121-122.

³⁶² *Ibid.*, 123.

in a sheltered workshop is appropriate and has led to fewer graduating high school seniors choosing a sheltered workshop rather than competitive integrated employment.³⁶³

³⁶³ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 171. *c.f. supra* notes 210-214; *but see* Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 122. (discussing Advisory Committee for Increasing Competitive Integrated Employment recommendation that the Wage and Hour Division verify there is a lack of competitive integrated employment opportunities in a state before issuing any 14(c) certificates in that state).

CHAPTER 2: DATA AND ANALYSIS

Summary of Currently Available Data

Estimates of the number of people with disabilities earning a subminimum wage vary widely, as there is no reliable, national census of the exact number of people with disabilities working in 14(c) sheltered workshops.³⁶⁴ A recent media report estimated that roughly 420,000 people with disabilities were earning subminimum wages.³⁶⁵ Government estimates of the number of people with disabilities earning subminimum wages are more modest. In 2018, a National Council on Disability report relying on data collected by the Department of Labor found that there were approximately 321,131 people with disabilities working under 14(c) certificates for subminimum wages.³⁶⁶ Data reported through an initiative funded by the Department of Labor's Office of Disability Employment Policy used data collected by the Wage and Hour Division that showed the number of people with disabilities employed under 14(c) certificates was smaller and has declined over the past three years. This is in part because they used a snapshot rather than the cumulative method of the National Council on Disability.³⁶⁷ According to the Wage and Hour Division, in 2017, there were a reported 164,347 people with disabilities working for 14(c) certificate holding entities, and then 130,951 in 2018, declining to 111,471 employees earning subminimum wages in 2019.³⁶⁸ As of April 2019, the Division's records indicated that there were approximately 109,000 people with disabilities identified on 14(c) certificate applications as being paid a subminimum wage by a certificate holder.³⁶⁹ The National Council on Disability explained the wide discrepancy in 2018 numbers in its report, stating that:

Based on the available estimated number, however, [Wage and Hour Division] currently reports a total of 141,081 people paid under 14(c) certificates in 2018, approximately only a third of the number of 14(c) workers reported by the [Government Accountability Office] 17 years ago. However, in the same month that it supplied [the National Council on Disability] with this data, it provided a wildly different estimate to Congress of approximately 321,131 workers employed by 14(c) certificate-holders, closer to [the Government Accountability Office's] original estimate. [Wage and Hour Division] has clarified that the 141,081 estimate represents only those workers employed at the

³⁶⁴ Zeigler Testimony, *Subminimum Wages Briefing*, pp. 68-69.

³⁶⁵ Rachel West, *Everyone Is Overlooking a Key Part of the New \$15 Minimum Wage Bill*, talk poverty (Jun. 19, 2019) <https://talkpoverty.org/2019/06/19/everyone-overlooking-key-part-new-15-minimum-wage-bill/>.

³⁶⁶ National Council on Disability, *National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future* at 26-27 (2018).

³⁶⁷ See *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*, U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 60, and accompanying text explaining the difference in methods.

³⁶⁸ The Lead Center, *Data and Resources to Inspire a Vision of Employment*, *National Data*, <http://www.drivedisabilityemployment.org/national-data> (last visited Jan. 22, 2020).

³⁶⁹ Butterworth Testimony, *Subminimum Wage Briefing*, p. 95.

certificate-holder's main establishment, whereas 321,131 represents the estimated total of workers employed at all establishments associated with the certificate-holder.³⁷⁰

As discussed herein, among other information, Wage and Hour Division data shows that 14(c) certificates are currently issued in 46 states and the District of Columbia, and that there is a significant number and percent of violations of the provisions protecting workers in 14(c) settings.

Census data is another key data set providing valuable information about employment of persons with disabilities. For example, the U.S. Census Bureau surveys the following types of disabilities: hearing difficulty, vision difficulty, cognitive difficulty, ambulatory difficulty, self-care difficulty, and independent living difficulty.³⁷¹ According to Dr. John Butterworth, Director of Employment Systems Change and Evaluation Senior Research Fellow at University of Massachusetts Boston's Institute for Community Inclusion, studies conducted by the institute show over 96 percent of people with disabilities working for a 14(c) certificate holder work for a Community Rehabilitation Program, and more than 80 percent of those employees have an intellectual or developmental disability (defined by the Census as "cognitive difficulty"³⁷²) as of April 2019.³⁷³ This means that an estimated 83.3 percent of persons working in 14(c) settings have intellectual or developmental disabilities.³⁷⁴ Census data also show that very generally speaking, persons with intellectual or developmental disabilities may have the hardest time finding employment.³⁷⁵ However further data and testimony reviewed by the Commission indicates that when given the opportunity and support needed, the persons in this category are capable of competitive integrated employment.³⁷⁶

Several panelists at the Commission's November 2019 briefing testified about how lack of data collection by the government hinders efforts to understand the 14(c) program and the population whom it serves.³⁷⁷ For example, Professor Butterworth of UMass Boston's Institute on Community Inclusion is part of a group of researchers who collect national data about employment

³⁷⁰ National Council on Disability, National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future at 27 (2018).

³⁷¹ U.S. Census, How Disability Data Are Collected by the American Community Survey, <https://www.census.gov/topics/health/disability/guidance/data-collection-acs.html> ("Disability data come from the American Community Survey (ACS), the Survey of Income and Program Participation (SIPP), and the Current Population Survey (CPS). All three surveys ask about six disability types: hearing difficulty, vision difficulty, cognitive difficulty, ambulatory difficulty, self-care difficulty, and independent living difficulty. Respondents who report anyone of the six disability types are considered to have a disability.").

³⁷² Ibid. ("The questions introduced in 2008 remain the same questions found in the current ACS questionnaires. They cover six disability types (and their PUMS variable): . . . **Cognitive difficulty**: Because of a physical, mental, or emotional problem, having difficulty remembering, concentrating, or making decisions (DREM).").

³⁷³ Butterworth Testimony, *Subminimum Wage Briefing*, p 95.

³⁷⁴ 80 percent of 96 = 83.3 percent

³⁷⁵ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities," U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 64 (discussing Census data of employment statistics by type of disability).

³⁷⁶ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities," U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 83-85. (discussing further data and testimony).

³⁷⁷ Romano Testimony, *Subminimum Wages Briefing*, pp. 38-39; Butterworth Testimony, *Subminimum Wages Briefing*, pp. 98, 111.

opportunities for people with intellectual and developmental disabilities. Butterworth noted in his written testimony to the Commission that no federal national data exist on individuals with disabilities who are paid a subminimum wage.³⁷⁸ In fact, his data collection efforts rely on data provided by state agencies or independent surveys, rather than data from the federal government.³⁷⁹ According to a national survey of people with disabilities conducted in part by Butterworth, between 2017 and 2018, the average wage of a person with a disability working under a 14(c) certificate was \$3.34 per hour,³⁸⁰ and the

Data Focusing on People with Disabilities and Their Employment

In 2018, the U.S. Census Bureau estimated based on its 1-year American Community Survey that there were approximately 40,637,764 people with disabilities in the United States, making up 12.6 percent of a total estimated U.S. population of 322,249,485.³⁸¹ Looking at this data over time shows that the number of persons who self-identify as persons with disabilities has been increasing.³⁸² For example, in 2010, the same 1-year American Community Survey found that approximately 11.9 percent of the total estimated population identified themselves as persons with disabilities.³⁸³ Reviewing Census data, the University of New Hampshire Institute on Disability found that:

- As the US population ages, the percentage of people with disabilities increases. In the US in 2016, less than 1.0 percent of the under 5 years old population had a disability.
- For those ages 5-17, the rate was 5.6 percent. For ages 18-64, the rate was 10.6 percent. For people ages 65 and older, 35.2 percent had a disability.
- In 2016, of the US population with disabilities, over half (51.0 percent) were people in the working ages of 18-64, while 41.4 percent were 65 and older.
- Disability in children and youth accounted for only 7.3 percent (ages 5-17) and 0.4 percent (under 5 years old).
- From 2008 to 2016, the percentages of people with each type of disability have remained relatively unchanged. The percentage of people with ambulatory disabilities, cognitive

³⁷⁸ Butterworth Statement at 2.

³⁷⁹ Butterworth Testimony, *Subminimum Wage Briefing*, pp. 94-95.

³⁸⁰ Butterworth Statement at 3.

³⁸¹ U.S. Census Bureau, American Community Survey (2018), Disability Characteristics, Table S1810, https://data.census.gov/cedsci/table?q=S18&d=ACS_percent201-Year_percent20Estimates_percent20Subject_percent20Tables&tid=ACSSST1Y2018.S1810&hidePreview=true&y=2018&moe=false.

³⁸² The U.S. Census uses self-identification (also known as survey data) as its main method of research. See, U.S. Census Bureau, *American Community Survey Design and Methodology*, (Jan. 30, 2014) https://www2.census.gov/programs-surveys/acs/methodology/design_and_methodology/acs_design_methodology_report_2014.pdf.

³⁸³ U.S. Census Bureau, American Community Survey (2010), Disability Characteristics, Table S1810, https://data.census.gov/cedsci/table?tid=ACSSST1Y2010.S1810&t=Disability&vintage=2018&hidePreview=true&cid=S1810_C01_001E.

disabilities, and independent living disabilities rose by 0.2 to 0.3 points over the period, while people with hearing, vision, and self-care disabilities rose 0.1 point or less.

- In the US in 2016, 35.9 percent of people with disabilities ages 18-64 living in the community were employed. The employment percentage was more than double for people without disabilities, 76.6 percent.
- The employment gap, difference between the employment percentage for people with disabilities (35.9 percent) and people without disabilities (76.6 percent), was 40.7 percentage points.³⁸⁴

There was a slight but statistically insignificant decrease in the percentage of persons with disabilities between the 2017 and 2018 American Community Survey.³⁸⁵

Employment and Labor Force Participation Rates of People with Disabilities

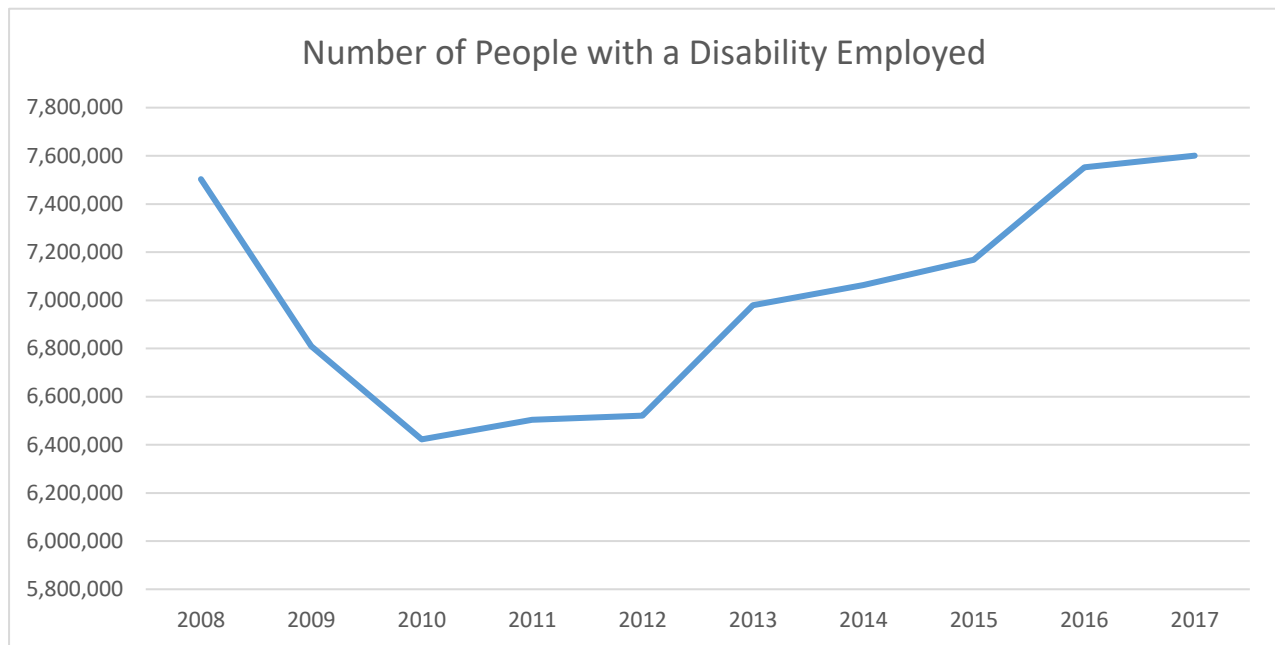
The American Community Survey found that the number of employed persons with a disability fluctuated between 2008 and 2017, decreasing between 2008 and 2010, before trending upward during the economic recovery that occurred in the United States post-2010.³⁸⁶

³⁸⁴ University of New Hampshire, Institute on Disability, 2017 Disability Statistics Annual Report, p. 2, https://disabilitycompendium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf.

³⁸⁵ Ibid., 3-4.

³⁸⁶ Statedata.info. (2020). Population Data from the American Community Survey (Post 2007), Any Disability. U.S. Total: Number of people employed, retrieved 02/04/2020 from <http://www.statedata.info/data/showchart/814103>.

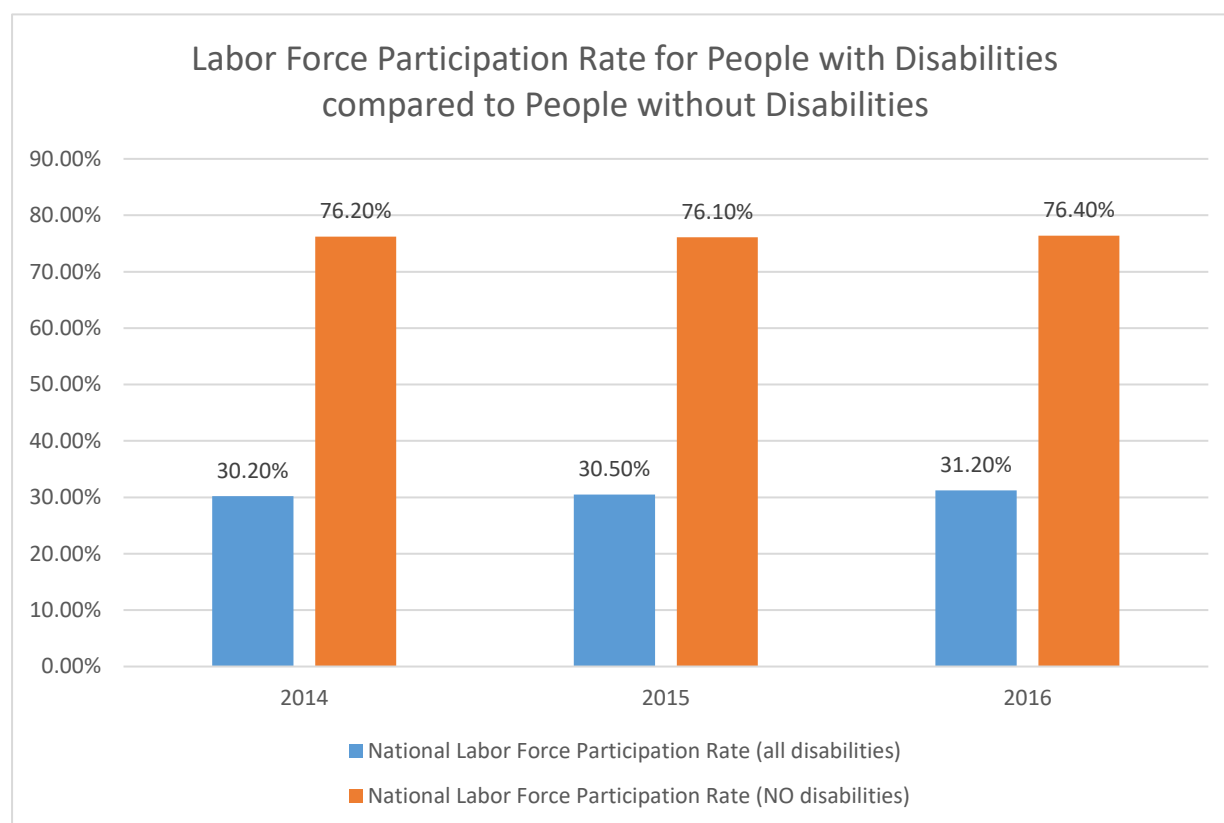
Chart 2.1



Source: UMass Boston, Institute for Community Inclusion, Statedata.info, Population Data from the American Community Survey

While the employment rate of people with disabilities has increased over the past decade, the participation rate of people with disabilities in the workforce is low when compared to the general U.S. population. As shown in Chart 2.2, between 2014 and 2016, the workforce participation rate for people with disabilities hovered around 30 percent, while the labor force participation rate for people without disabilities was approximately 76 percent.³⁸⁷

³⁸⁷ The LEAD Center, Data and Resources to Inspire a Vision of Employment, National Data, http://www.drivedisabilityemployment.org/national-data#quicktabs-national_big_screen=0. Persons with a Disability: Labor Force Characteristics News Release. (2014, 2015, 2016). Retrieved May 13, 2020, from <https://www.bls.gov/bls/news-release/home.htm> see also *supra* note 386 (discussing 2008 market decline and subsequent recovery).

Chart 2.2

Source: Persons with a Disability: Labor Force Characteristics News Release. (2014, 2015, 2016). Retrieved May 13, 2020, from <https://www.bls.gov/bls/news-release/home.htm>

A survey of state vocational rehabilitation agencies showed the majority of people with disabilities who attended a vocational rehabilitation services program between 2007 and 2016 identify as white and male.³⁸⁸ The survey also found that the percentage of non-white people with disabilities has been increasing since 2007.³⁸⁹ In 2016, 62 percent of people with disabilities were white, 24 percent were black, 12 percent were Latino, and 3 percent identified as another ethnicity.³⁹⁰ Fifty-six percent were male, and 44 percent were female.³⁹¹

People of color with disabilities may experience dual or intersectional forms of discrimination. For example, in 2019, the Commission's research found intersectional disparities in education,

³⁸⁸ Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). StateData: The national report on employment services and outcomes through 2016. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion at 25.

³⁸⁹ Ibid., p.25; State Vocational Rehabilitation services are authorized and funded by the Rehabilitation Act of 1973, 29 U.S.C. §§ 720-21, as amended. Vocational Rehabilitation services aim to advance the employment of individuals with disabilities, *see*, 29 U.S.C. § 721(a)(6)(B).

³⁹⁰ Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). StateData: The national report on employment services and outcomes through 2016. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion at 25-26.

³⁹¹ Ibid.

“show[ing] that many schools throughout the United States utilize and rely upon discipline policies that allow for disproportionate removal of students of color with disabilities from classrooms, often for minor infractions of school rules and often in ways that are inappropriately applied by teachers, non-administrative staff, and school officials.”³⁹² The Commission found that these intersectional disparities were “stark,” for example, black students with disabilities lost approximately 77 more days of instruction compared to white students with disabilities.³⁹³

Available Intersectional Data

Finn Gardiner of Brandeis University testified that the intersectional data on race and disability is currently insufficient to fully understand the way people with disabilities enter and exit subminimum wage or sheltered employment, stating:

For example, people of color who may have reduced employment opportunities because of systemic racism may find themselves being shunted into these work centers, these sheltered workshops, because of both a combination of systemic prejudice based on both their race and their disability and I feel that having that kind of intersectional approach regarding employment and disability and race is also important.³⁹⁴

³⁹² U.S. Com’n on Civil Rights, *Beyond Suspension: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, July 2019 <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>, p. 9.

³⁹³ *Ibid.* at 163.

³⁹⁴ Gardiner Testimony, *Subminimum Wages Briefing*, p. 165.

Table 2.1: 2018 Labor Force Participation of People with Disabilities by Race

Race	Labor Force Participation Rate (percent)
White	21.0
Black	18.4
Asian	18.4
Hispanic or Latino/a	23.1

Source: Persons with a Disability: Labor Force Characteristics News Release. (2014, 2015, 2016). Retrieved May 13, 2020, from <https://www.bls.gov/bls/news-release/home.htm>.

When focused on people with intellectual or developmental disabilities (“ID” in Table 2.2), the percentage of people with disabilities who identify as white falls by about eight percent, from 62 percent to 56 percent.³⁹⁵

Table 2.2: Demographic Trends of People with Disabilities 2007-2016

	Gender				Race and ethnicity							
	Male		Female		White (Non-Hispanic)		Black (Non-Hispanic)		Hispanic		Other	
	ID (%)	Other (%)	ID (%)	Other (%)	ID (%)	Other (%)	ID (%)	Other (%)	ID (%)	Other (%)	ID (%)	Other (%)
2007	55%	55%	45%	45%	59%	66%	32%	22%	7%	9%	2%	3%
2008	55%	56%	45%	44%	58%	66%	33%	22%	7%	9%	2%	3%
2009	56%	56%	44%	44%	58%	66%	33%	23%	7%	9%	2%	3%
2010	57%	57%	43%	43%	56%	64%	34%	24%	8%	9%	2%	2%
2011	58%	57%	42%	43%	56%	64%	34%	24%	8%	10%	2%	3%
2012	58%	57%	42%	43%	55%	64%	35%	24%	7%	10%	3%	3%
2013	58%	56%	42%	44%	54%	63%	35%	24%	8%	10%	2%	3%
2014	57%	56%	43%	44%	56%	63%	33%	24%	9%	11%	3%	3%
2015	57%	56%	43%	44%	56%	62%	33%	24%	9%	11%	3%	3%
2016	57%	56%	43%	44%	56%	62%	33%	24%	9%	12%	3%	3%

Source: Institute for Community Inclusion, Rehabilitation Services Administration

³⁹⁵ Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). StateData: The national report on employment services and outcomes through 2016. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion at 25-26.

Failure to collect sufficient data about employment outcomes for people with disabilities is a persistent issue across federal and state government agencies.³⁹⁶ The Final Report from the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities recommended that the Departments of Labor, Education, and Health and Human Services, along with the Social Security Administration coordinate data collection with the goal of providing recommendations to states to enhance data collection at the state and local level.³⁹⁷

The Wage and Hour Division does not collect data on average subminimum wages paid to people with disabilities, or how subminimum wages paid to people with disabilities have changed over time, nor do they collect data about race.³⁹⁸ Some studies have attempted to gather an understanding of national trends based on data compiled by state agencies.³⁹⁹ However, data collected from states is incomplete, as not all states report metrics about people with disabilities in a consistent manner, if at all.⁴⁰⁰

Data about 14(c) Certificate Holders and Employees with Disabilities

Data and Resources to Inspire a Vision of Employment, an initiative by the LEAD Center at the National Disability Institute funded by the Office of Disability Employment Policy, collects some aggregate data about 14(c) employment of people with disabilities based on information submitted in 14(c) applications.⁴⁰¹ The Center reported a decline over the last three years in the number of people with disabilities reportedly working for subminimum wages under a 14(c) certificate from 164,347 people with disabilities working for a 14(c) certificate holder in 2017 to 111,471 people with disabilities working for a 14(c) certificate holder in 2019, as shown in the chart below.⁴⁰²

³⁹⁶ Romano Testimony, *Subminimum Wages Briefing*, p. 38; Barkoff Testimony, *Subminimum Wages Briefing*, pp. 45-46; Butterworth Testimony, *Subminimum Wages Briefing*, pp. 105-06, 112-13, 118; Gardiner Testimony, *Subminimum Wages Briefing*, p. 164-65; Christensen Testimony, *Subminimum Wages Briefing*, p. 210; Kline Testimony, *Subminimum Wages Briefing*, pp. 305-06; Lewis Testimony, *Subminimum Wages Briefing*, pp. 284, 306-07.

³⁹⁷ Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at 17, 100 (Sept. 15, 2016).

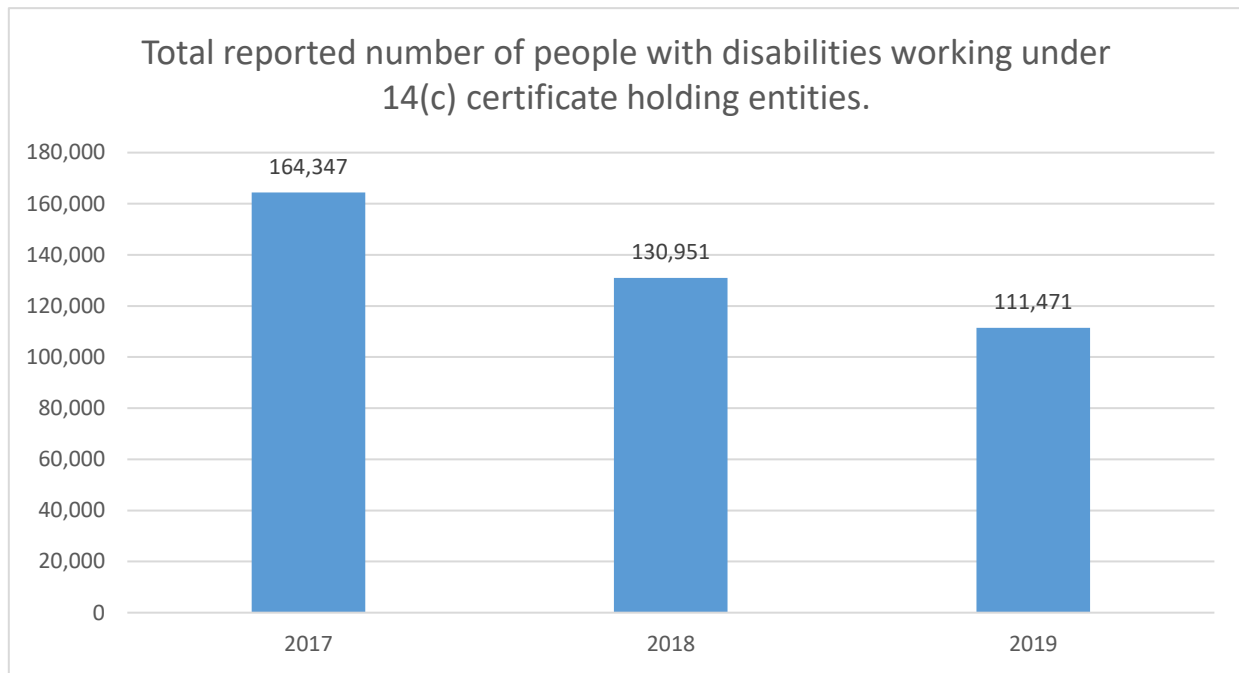
³⁹⁸ Wage and Hour Division Response to USCCR Interrogatory Nos. 16-17 at 7.

³⁹⁹ See e.g. Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). *StateData: The national report on employment services and outcomes through 2016*. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion.

⁴⁰⁰ Butterworth Testimony, *Subminimum Wages Briefing*, p. 112; See, Butterworth Response to USCCR Follow-Up Question No. 2 at 1-2.

⁴⁰¹ The LEAD Center, Data and Resources to Inspire a Vision of Employment, National Data, http://www.drivedisabilityemployment.org/national-data#quicktabs-national_big_screen=0. This summary statistic is available on the DRIVE website (<http://www.drivedisabilityemployment.org/national-data>), which aggregates publicly available information on 14(c) certificate holders made available by DOL's Wage and Hour Division (<https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders>)

⁴⁰² This summary statistic is available on the DRIVE website (<http://www.drivedisabilityemployment.org/national-data>), which aggregates publicly available information on 14(c) certificate holders made available by DOL's Wage and Hour Division (<https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders>) Ibid.

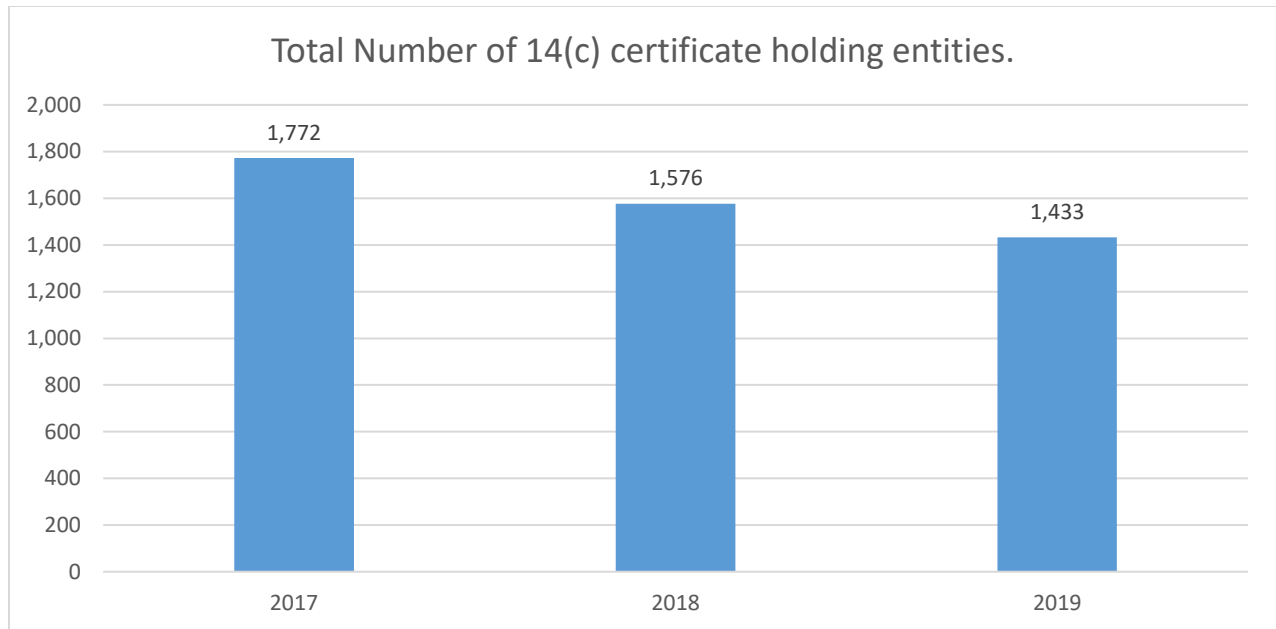
Chart 2.3

Source: The LEAD Center, Data and Resources to Inspire a Vision of Employment

The decline in the number of people with disabilities working in 14(c) workshops has been accompanied by a similar decline in the overall number of 14(c) certificate holders. Chart 2.4 shows the number of 14(c) certificate holding entities declined from 1,772 in 2017 to 1,433 in 2019, a drop of 339 entities. Data presented in written testimony to the Commission by Indiana University's Dr. Teresa Grossi suggests an even more stark reduction of 1,026 14(c) certificates, and a reduction of 145,229 individuals with disabilities employed under a 14(c) certificate since 2016.⁴⁰³

⁴⁰³ Grossi Statement, *Subminimum Wages Briefing*, at 3.

Chart 2.4



Source: Wage and Hour Division

The publicly available national data tracked by the Department of Labor is limited by what the Wage and Hour Division collects on 14(c) applications or 14(c) renewal applications. While the Wage and Hour Division has recently shifted to allowing entities to apply for a 14(c) certificate using a digital application, the information collected remains the same.⁴⁰⁴ As discussed, this limited information is ,⁴⁰⁵ unable to provide complete data on the number of people with disabilities working for subminimum wages beyond the snapshot in time that Wage and Hour Division already collects, namely the number of employees with disabilities working for subminimum wages during the most recent fiscal quarter before a 14(c) certificate holder applies for a certificate renewal.⁴⁰⁶

Wage and Hour Division has been undertaking a modernization of its Section 14(c) systems, including its certificate application processing and the new online certificate application.⁴⁰⁷ Because the Wage and Hour Division is in the process of migrating to these digital systems, the Division has not yet been able to effectively analyze how the digital application will impact data collection and analysis, or how the Wage and Hour Division can use this electronically collected

⁴⁰⁴ Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (on file).

⁴⁰⁵ Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (on file).

⁴⁰⁶ Wage and Hour Division Response to USCCR Interrogatory No. 19 at 8; *See supra*, notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.** (describing the limited data WHD collects from 14(c) certificate applications).

⁴⁰⁷ Wage and Hour Division Response to USCCR Interrogatory No. 19 at 8; *See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*, U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 61-62 (describing the limited data Wage and Hour Division collects from 14(c) certificate applications).

data to inform its administration of the 14(c) program.⁴⁰⁸ Also, unfortunately, despite the expectation that it might provide additional data,⁴⁰⁹ the data collected on the new online application is the same as the limited data from the old paper application.⁴¹⁰

Data collected by the Wage and Hour Division through 14(c) certificate applications includes:

- the total number of establishments and work sites covered by the certificate;
- the number of workers with disabilities covered by the certificate at the end of the most recent fiscal quarter;
- whether the certificate holder has certain government contracts, such as those subject to the Service Contract Act;
- information about prevailing wage studies the applicant has conducted for workers earning an hourly wage;
- information about work measurement or time studies conducted by the applicant for workers earning an hourly wage;
- information about prevailing wage studies conducted for workers earning a piece rate;
- information about work measurement or time studies conducted by the applicant for workers earning a piece rate;
- the number of workers with disabilities for whom the applicant was a representative payee for Social Security Benefits; and
- information about whether the applicant addressed the requirements under the Workforce Innovation and Opportunity Act.⁴¹¹

Starkly missing from this dataset is any demographic information, information about how long employees stay on or move on to competitive integrated employment, nor any detail about the type of job training and information about opportunities to pursue competitive integrated employment provided under the Workforce Innovation and Opportunity Act.⁴¹² Many individuals who submitted public comments to the Commission expressed concern that there are not yet enough data to formulate a clear picture of who people being paid subminimum wages are, and what the

⁴⁰⁸ Zeigler Testimony, *Subminimum Wages Briefing*, pp. 51-52; Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (on file).

⁴⁰⁹ See, National Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, pp. 26-27 (Oct. 16, 2018) https://ncd.gov/sites/default/files/Documents/NCD_Deal_Report_508.pdf; See also, Wage and Hour Division, Response to USCCR Interrogatory No. 18 at 7-8.

⁴¹⁰ Wage and Hour Division, Response to Affected Agency Review (May 19, 2020) (on file).

⁴¹¹ U.S. Dep't of Labor Wage and Hour Division, Form WH-226: Application for Authority to Employ Workers with Disabilities at Subminimum Wages (Revised Dec. 2016) <https://www.dol.gov/whd/forms/wh226.pdf>; Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (on file).

⁴¹² Ibid. For example, the question asking for information about "Requirements under the Workforce Innovation and Opportunity Act" only asks: "Did the employer review, verify, and maintain documentation showing that the worker received all services and counseling required by WIOA before paying the worker a subminimum wage?," which is followed by blanks for employee names and dates, with no request for nor any room for any additional information. Ibid., 16(b).

employment outcomes are for people with disabilities who transition to competitive employment.⁴¹³ Additionally, the National Council on Disability called on the Secretary of Labor to update the 14(c) application to collect more data about 14(c) certificate holders and people with disabilities, including the number of workers with disabilities earning subminimum wages and the number who have transitioned to competitive integrated employment.⁴¹⁴ The Commission received testimony that argued that while more data about people with disabilities could be collected, the data currently available is sufficient to understand that it is time to remedy the inequities caused by the Section 14(c) certificate program.⁴¹⁵

Data about Transitioning to Competitive Integrated Employment

While data show the number of people employed in 14(c) workshops decreasing over time, the number of people with disabilities working in competitive employment as reported by state intellectual and developmental disabilities agencies has increased dramatically over the past few decades, from approximately 33,092 in 1988 to approximately 130,402 in 2017.⁴¹⁶ This reporting increase may be because the total population of persons with disabilities has also increased in recent years.⁴¹⁷ State data also shows that the percentage of people with intellectual and developmental disabilities working in competitive integrated employment has remained low, as just 19 percent of working age adults with intellectual or developmental disabilities who are supported by state agencies had a competitive, integrated job.⁴¹⁸ As discussed, because of federal funding structures for Community Rehabilitation Programs, there is relatively more data about persons in this category.⁴¹⁹

⁴¹³ See, e.g. U.S. Representative Sam Graves, Written Statement for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights, Jan. 10, 2020 at 1 (on file).

⁴¹⁴ Nat’l Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, p. 102 (Oct. 2018) https://ncd.gov/sites/default/files/Documents/NCD_Deal_Report_508.pdf.

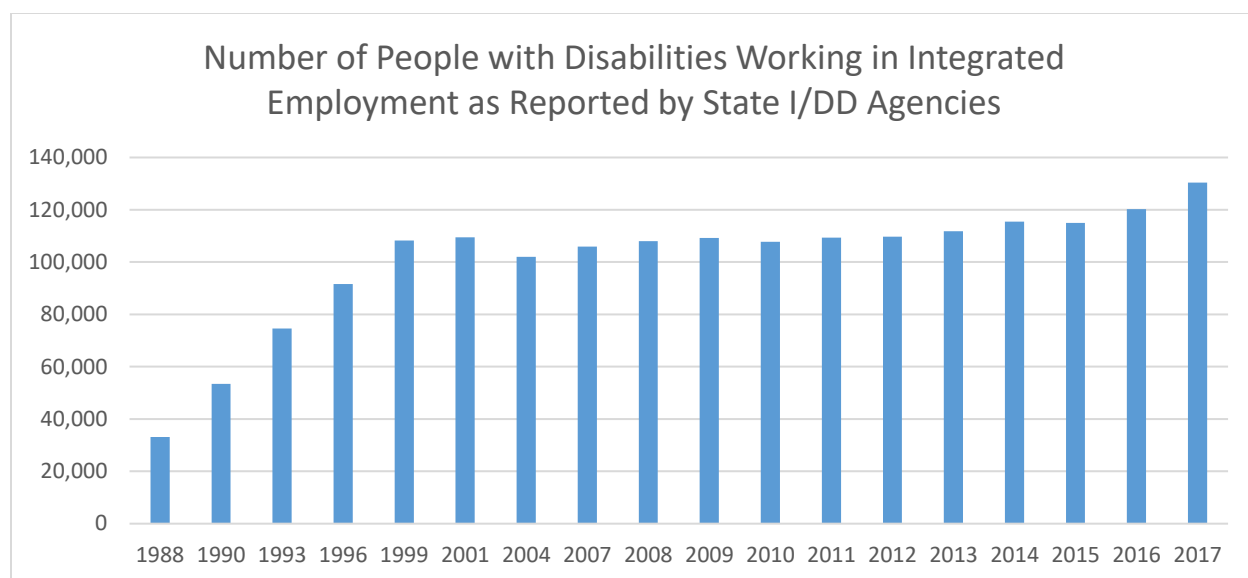
⁴¹⁵ See, e.g., U.S. Representative Cathy McMorris Rodgers, Written Statement for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights, Jan. 15, 2020 at 1 (on file).

⁴¹⁶ UMass Boston, Institute for Community Inclusion, Statedata.info. *State IDD Agencies. U.S. Total: Integrated employment, number.* <http://www.statedata.info/data/showchart/686484> (last accessed Feb. 1, 2020).

⁴¹⁷ See *supra* notes 381-384.

⁴¹⁸ Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). *StateData: The national report on employment services and outcomes through 2016*. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion at 3; see *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 74.

⁴¹⁹ See *supra* note 40.

Chart 2.5

Source: UMass Boston, Institute for Community Inclusion, Statedata.info, *State IDD Agencies. U.S. Total: Integrated employment, number*. Retrieved 02/01/2020 from <http://www.statedata.info/data/showchart/686484>.

Researchers have also found that:

In the [intellectual/developmental disabilities] system, national estimates suggest that there has been only modest growth in the number of individuals in integrated employment services since 1988. The estimated percentage of individuals participating in integrated employment services was 18.8 percent in FY2016, while investment in non-work services continues to expand. FY2016 data do suggest slight growth in the number of people in integrated employment services over the last five years. Several states each reported an increase of more than 500 individuals in integrated employment services over that five-year period.⁴²⁰

Data regarding all persons with disabilities (not just those with intellectual/developmental disabilities) show similar trends of less employment than the general population. For example, Census data show that in 2016, 67.3 percent of working age people without a disability were employed⁴²¹ compared to only 35.5 percent of working age people with disabilities.⁴²²

⁴²⁰ Ibid., 2.

⁴²¹ UMass Boston, Institute for Community Inclusion, Statedata.info. (2020). Population Data from the American Community Survey (Post 2007), Any Disability. U.S. Total: Percent of Working-Age People Who Are Employed. Retrieved 02/13/2020 from <http://www.statedata.info/data/showchart/505500>.

⁴²² U.S. Census Bureau, American Community Survey, Employment Status by Disability and Type (2016) [https://data.census.gov/cedsci/table?q=B18120 percent3A percent20EMPLOYMENT percent20STATUS percent20BY percent20DISABILITY percent20STATUS percent20AND percent20TYPE&hidePreview=true&tid=ACSDT1Y2016.B18120](https://data.census.gov/cedsci/table?q=B18120%20percent3A%20percent20EMPLOYMENT%20STATUS%20BY%20DISABILITY%20STATUS%20AND%20TYPE&hidePreview=true&tid=ACSDT1Y2016.B18120).

Employment rates can vary depending on type of disability.⁴²³ For example, among the six categories that the Census uses for type of disability, those with hearing disabilities were employed at 51.7 percent, while 43.5 percent of those with vision disabilities were employed, followed by 26.3 percent of persons with cognitive disabilities, 24.8 percent of those with ambulatory disabilities, 17.0 percent of those unable to live independently, and 15.5 percent of those with self-care challenges.⁴²⁴ Some believe that those with intellectual/developmental disabilities have the most challenges in being able to work productively. The most comparable Census category is persons with cognitive disabilities, and they reported 26.3 percent employment rates, not the lowest and actually, among the five Census categories, they had the second-highest employment rates.⁴²⁵

Even though the number of people with disabilities working in 14(c) workshops has decreased in recent years, and the number of people with disabilities working in competitive integrated employment is increasing, it is difficult to determine whether people with disabilities are moving from segregated employment in 14(c) workshops to competitive integrated employment. As Grossi noted in her testimony, national data does not exist that tracks how long people with disabilities remain in 14(c) employment, what happens after an individual is no longer working for a 14(c) employer, the wages that a person with a disability earns whether working under a 14(c) certificate or in competitive integrated employment, or demographic information including type of disability.⁴²⁶ Regardless of ability to track the movement of people with disabilities in and out of 14(c) workshops, Grossi testified that the data does show people with disabilities and their families express an opinion that people with intellectual and developmental disabilities can work in the community, and would consider competitive integrated employment if presented with the option.⁴²⁷

In a random survey of people with disabilities by 44 states voluntarily participating in the National Core Indicators tracking of disability services, 45 percent of individuals with intellectual or developmental disabilities who did not have a job indicated they wanted a competitive job.⁴²⁸ However, only 43 percent of those who wanted a competitive job had an employment goal in their employment service plan to achieve such an outcome.⁴²⁹ Butterworth also noted in his testimony

⁴²³ See Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 74-75.

⁴²⁴ Kraus, L., Lauer, E., Coleman, R., and Houtenville, A., University of New Hampshire Institute on Disability, *2017 Disability Statistics Annual Report* p. 18 (2018), https://disabilitycompendium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf.

⁴²⁵ Ibid.

⁴²⁶ Grossi Statement, *Subminimum Wages Briefing* at 3.

⁴²⁷ Ibid., 3-4.

⁴²⁸ National Core Indicators, National Core Indicators At-A-Glance Report: 2017-2018, p. 4 (2018), https://www.nationalcoreindicators.org/upload/core-indicators/NCI_AtAGlanceReport_1718_Final_May2019.pdf.

⁴²⁹ Grossi, Statement, *Subminimum Wages Briefing* at 4 (state vocational rehabilitation and/or agencies that work with people with intellectual and developmental disabilities develop service plans that include employment goals and steps the individual and service provider will take to achieve those goals).

before the Commission that people with disabilities not working in a community job want more job options, noting “[a]most half of them say they want a job in the community. And this speaks directly to unrealized goals and dreams.”⁴³⁰

In his testimony before the Commission, Anil Lewis, Executive Director of Blindness Initiatives at National Federation of the Blind, discussed data the government should be collecting to better facilitate opportunities for competitive integrated employment for people with disabilities.

The data we should be looking at is: what is going to be that cost to implement those innovative systems that create opportunity for those individuals who were previously deemed unemployable to obtain competitive employment? Because there are so many examples of people who have been labeled unemployable, that when they're put in an environment with individuals that believe in their capacity, set their expectations, provide the proper training and support, they obtain competitive, integrated employment.⁴³¹

There is some data about Community Rehabilitation Programs, which represent 93 percent of 14(c) certificate holders as of January 1, 2020 according to the Wage and Hour Division’s snapshot of current and pending certificate holders.⁴³² This data shows that in recent years, the types of services provided by Community Rehabilitation Programs have been gradually shifting from offering purely facility-based services, to providing a mix of facility based and integrated services.⁴³³ In 2002-2003, eighteen percent (18 percent) of individuals receiving services from a Community Rehabilitation Program received services in an integrated setting.⁴³⁴ In 2010-2011, that number rose to 28 percent, and in 2014-2015, the number rose again to 38 percent of individuals receiving at least some services in an integrated setting.⁴³⁵ However, as Butterworth cautioned in his testimony to the Commission, services defined as integrated may include small group employment that still pays a subminimum wage to people with disabilities.⁴³⁶

Figure 2.1 shows that as of 2017, the overwhelming majority of people with intellectual or developmental disabilities were still receiving employment services in a segregated setting.

⁴³⁰ Butterworth Testimony, *Subminimum Wages Briefing*, p. 97.

⁴³¹ Anil Lewis Testimony, *Subminimum Wages Briefing*, p. 294.

⁴³² See *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*, U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 105.

⁴³³ Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018).

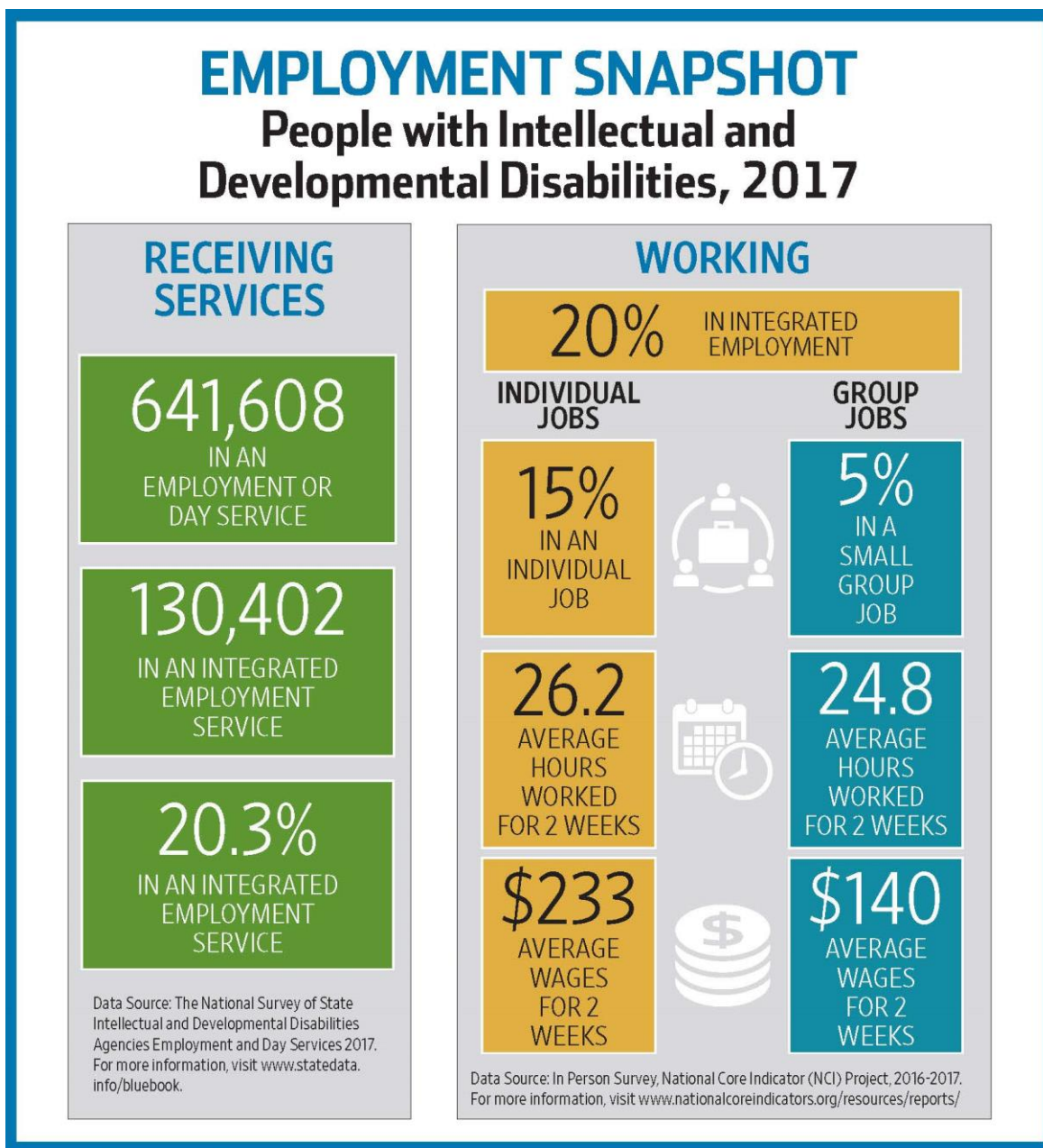
StateData: The national report on employment services and outcomes. through 2016. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion at 3.

⁴³⁴ Ibid.

⁴³⁵ Ibid.

⁴³⁶ Butterworth Testimony, *Subminimum Wages Briefing*, p. 96; Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). StateData: The national report on employment services and outcomes. through 2016. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion at 3.

Figure 2.1



StateData.info



ThinkWork!

This graphic is a product of StateData, a project of ThinkWork! at the Institute for Community Inclusion, University of Massachusetts Boston, supported in part by the Administration on Intellectual and Developmental Disabilities, Administration for Community Living, US Department of Health and Human Services, under cooperative agreement #90DNPA0002. The opinions contained herein are those of the grantee and do not necessarily reflect those of the funders.

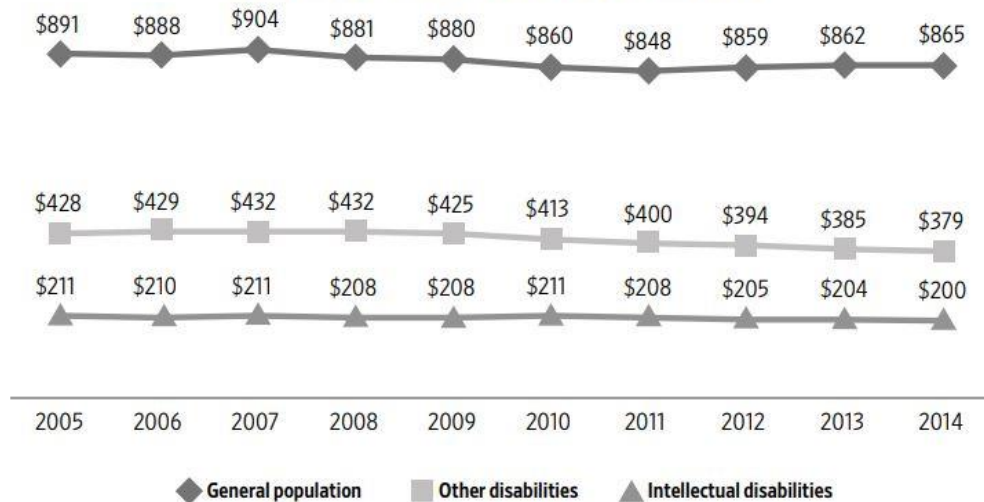
Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2019). StateData: The national report on employment services and outcomes through 2017. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion.

Source: UMass Boston, Institute for Community Inclusion, StateData.info

The data show a large gap in weekly wages earned by the general population as compared to individuals with intellectual disabilities, the largest population served by 14(c) certificate holders (\$865 per week for the general population compared to \$200 per week for individuals with intellectual disabilities in 2014).⁴³⁷

Figure 2.2

Figure 6. Trends in Weekly Wages (in 2014 Dollars)*



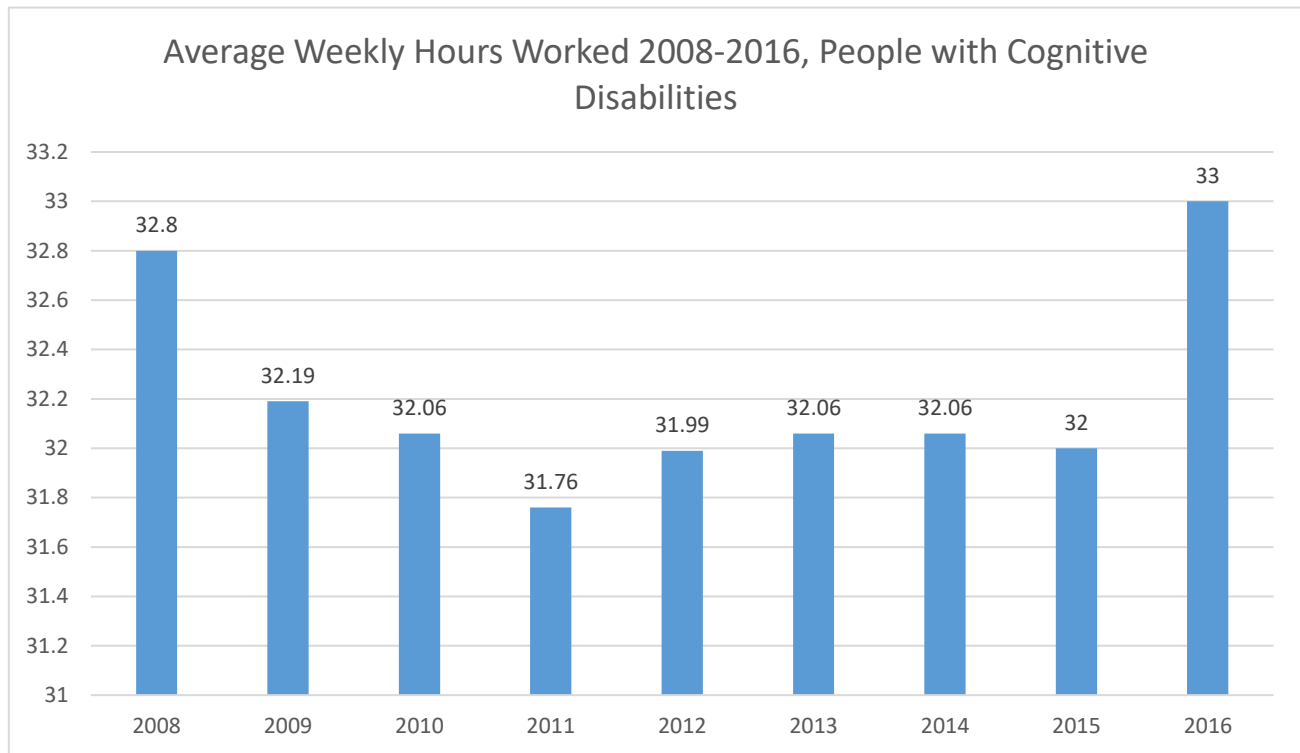
* Earnings of the general population were computed by dividing the annual wages of civilians, ages 16–64, by 52 weeks, using data from the American Community Survey.

Source: Institute for Community Inclusion

As shown by Chart 2.6, between 2008 and 2016, the average number of hours that people with intellectual and developmental disabilities worked on a weekly basis declined slightly from 2008 when they worked an average of 32.8 hours per week to a low of 31.8 hours per week in 2011. The average number of hours worked per week by people with intellectual and developmental disabilities (termed “cognitive disabilities”) increased between 2011 and 2016 to an average of 33 hours per week, slightly more than the average number of hours worked in 2008.

⁴³⁷ Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). StateData: The national report on employment services and outcomes through 2016. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion at 24.

Chart 2.6



Source: UMass Boston, Institute for Community Inclusion, Statedata.info, Cognitive Disability. U.S. Total: Weekly hours worked.

Retrieved 02/05/2020 from <http://www.statedata.info/data/showchart/905726>

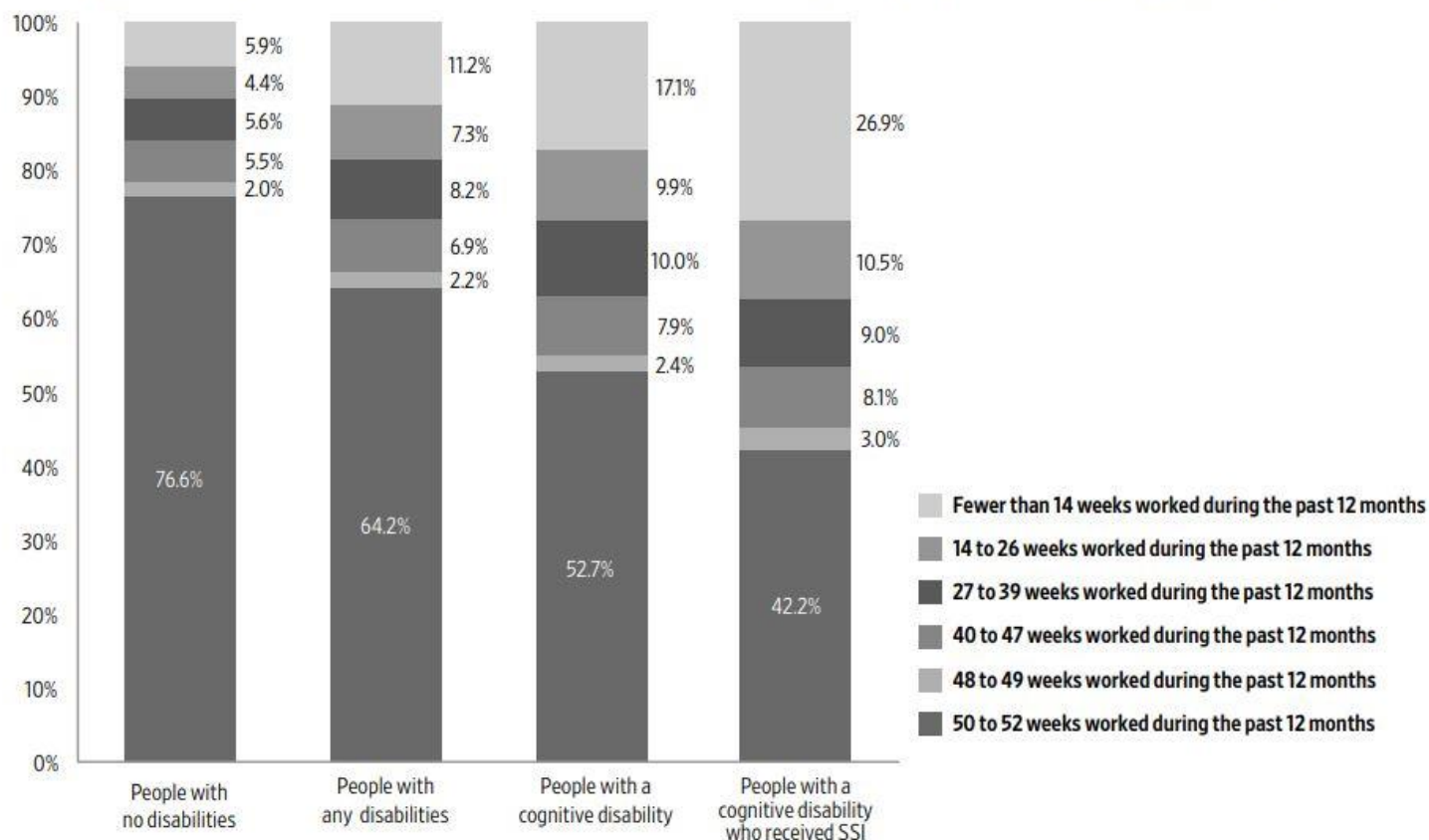
Data from the 2016 American Community Survey conducted by the Census Bureau and analyzed by the Institute for Community Inclusion found that people with cognitive disabilities worked fewer weeks during a 12-month period on average than people without disabilities.⁴³⁸ People with cognitive disabilities also worked fewer weeks on average than people with other types of disabilities, and as compared with people in the workforce without disabilities.⁴³⁹

⁴³⁸ Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). StateData: The national report on employment services and outcomes through 2016. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion at 30.

⁴³⁹ Ibid., p.30.

Figure 2.3

Figure 7. Number of Weeks Worked in the 12 Months Prior to Responding to the ACS among Employed Individuals



Source: Institute for Community Inclusion

As Butterworth identified in his written testimony to the Commission, there are significant gaps in the data about individual outcomes as people with disabilities transition out of subminimum wage jobs.⁴⁴⁰ In response to a question during the Commission's November 2019 briefing, Butterworth stated that possibly the only data on movement of people with disabilities from subminimum wage employment to competitive integrated employment suggests that three to five percent of people working in Community Rehabilitation Programs transition to competitive integrated employment; however that data comes from a study published in 1979.⁴⁴¹

Butterworth testified that there has not been a study compiling data on the number of people with disabilities who have transitioned from Community Rehabilitation Programs to competitive integrated employment since the 1979 study.⁴⁴² Furthermore, there is no national data available

⁴⁴⁰ Ibid., 5.

⁴⁴¹ Butterworth and Grossi Testimony, *Subminimum Wages Briefing*, pp. 114-115.

⁴⁴² Ibid., 108.

that tracks what happens to people with disabilities who were working for 14(c) certificate holders in states that have abolished the payment of subminimum wages.⁴⁴³ Additionally, the federal government does not collect consistent, national data of people working in sheltered workshops, including their disability, their wages, their hours, and how long they have been employed under a 14(c) certificate.⁴⁴⁴

However, the National Council on Disability and others have collected relevant economic data. According to data summarized by the National Council on Disability, a productivity or profitability analysis does not apply to 14(c), as most employees receive some form of supported employment benefits:

The 14(c) subminimum wage program is utilized primarily by nonprofit or state-operated social services providers— specifically, sheltered workshops—rather than private, for-profit businesses. According to GAO, 95 percent of all workers with disabilities being paid less than minimum wage under the 14(c) program were employed by sheltered workshops.⁴⁴⁵

Also:

People with disabilities in supported employment who had previously been served in sheltered workshop settings do not show a higher rate of employment as compared to those who had gone straight to supported employment without ever being in a sheltered workshop. However, research indicates that those who had previously been in sheltered workshops had higher support costs and lower wages than comparable people who had never been in sheltered workshop settings.⁴⁴⁶

Further, as discussed herein, companies such as Microsoft and Melwood have seen financial benefits as a result of paying people with disabilities minimum wage or above.⁴⁴⁷ For example: “Research indicates that employees receiving supported employment services generate lower cumulative costs than employees receiving sheltered workshop services and that, whereas the cost-

⁴⁴³ Ibid., 112.

⁴⁴⁴ Butterworth Statement, at 5.

⁴⁴⁵ Nat’l Council on Disability, *Subminimum Wage and Supported Employment* p. 11 (Aug. 23, 2012) https://www.ncd.gov/sites/default/files/NCD_Sub_percent20Wage_508.pdf.

⁴⁴⁶ Ibid., 11.

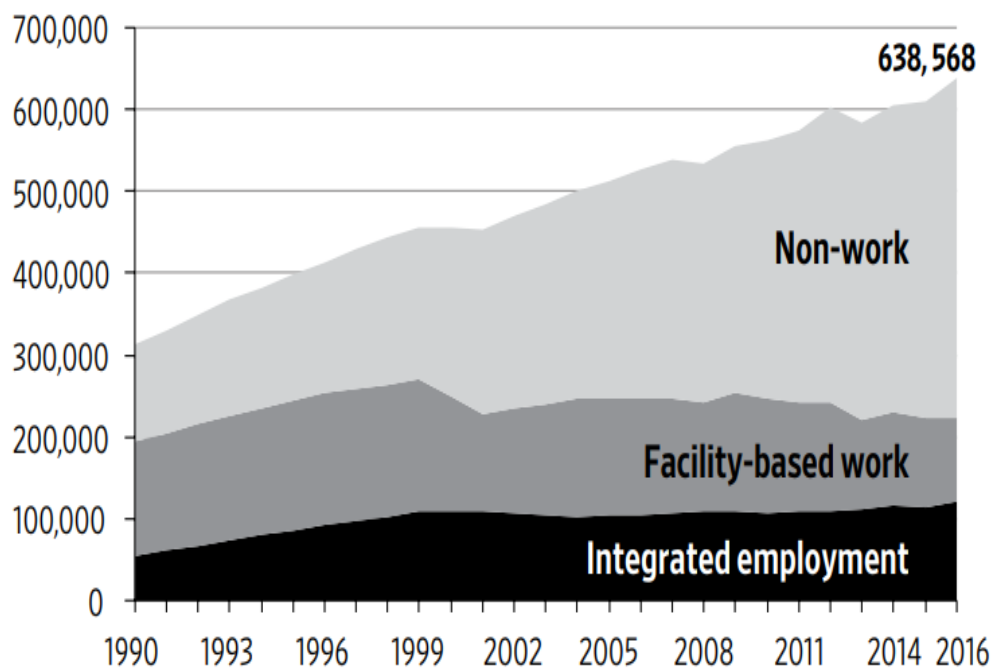
⁴⁴⁷ Collins Testimony, *Subminimum Wages Briefing*, p. 275 (Research shows companies that promote disability inclusion are more profitable and are four times more likely to have a total shareholder return that outperforms their peers); DeSantis Statement, *Subminimum Wages Briefing*, pp. 3-4 (an economic impact report found that “Melwood workers of differing abilities earned more than \$27.7 million in wages and paid approximately \$6 million in federal, state and local taxes. Through their spending in their communities, Melwood’s employees of differing abilities have helped generate an additional 135 jobs in other businesses in the region and their total induced economic output was nearly \$19 million in the [Washington, DC metro area]”).

trend of supported employees shifts downward over time, the opposite is the case for people receiving sheltered workshop services.”⁴⁴⁸

Transitions to competitive integrated employment may also be aided by the provision of services to assist the employee in their work, and/or to complement their workday with non-work activities. The same is true of 14(c) workshops, where considerable supports may be provided,⁴⁴⁹ as over 93 percent of certificate holders are Community Rehabilitation Programs.⁴⁵⁰

Figure 2.4

Figure 3. Trend Line for Estimated Total Number of People Served by State IDD Agencies and Estimated Number Served in Integrated Employment



Source: Written Testimony of John Butterworth to USCCR; Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). *StateData: The national report on employment services and outcomes through 2016*. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion at 16.

As shown by Figure 2.4 above, state intellectual and developmental disability agencies provide various types of services for people with disabilities, including placements in integrated employment opportunities, facility-based work settings, and other, non-work related supports and

⁴⁴⁸ Nat'l Council on Disability, *Subminimum Wage and Supported Employment* p. 11 (Aug. 23, 2012) https://www.ncd.gov/sites/default/files/NCD_Subpercent20Wage_508.pdf. (citing sources).

⁴⁴⁹ See *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*, U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 153-158. (MVLE roundtable discussion).

⁴⁵⁰ See *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*, U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 105.

services. Since 1990, the number of people with intellectual and developmental disabilities who receive some kind of service from a relevant state agency has roughly doubled from approximately 300,000 people in 1990 to over 600,000 people in 2017. Of those, the number of people who participated in non-work services grew from 115,000 in 1990 to 413,000 in 2017.⁴⁵¹ Still, while the overall number of people with intellectual and developmental disabilities has grown over the past three decades, the data also show that the number of people receiving facility-based work services has been relatively stagnant since 2000, meaning that employment in sheltered workshops has not seen growth consistent with an increase in the population of people with I/DD.⁴⁵² During this same time period, the number of people with intellectual or developmental disabilities in integrated employment has increased and the number in non-work settings has also increased.⁴⁵³

States that have either ended subminimum wages for people with disabilities, or enacted legislation to phase out subminimum wages have seen some improvements in employment outcomes for people with intellectual and developmental disabilities. For the Commission's briefing, Dr. Julie Christensen submitted written testimony discussing the data below. Her data set forth in Table 2.3 shows the employment rates for non-institutionalized people with disabilities between the ages of 21-64 in four of the states that Christensen categorizes as having ended or having begun phasing out payment of subminimum wages to people with disabilities before 2017. In all four of these states, and particularly in Vermont, the employment rate of people with cognitive disabilities increased between 2016 and 2017.⁴⁵⁴

⁴⁵¹ Butterworth Statement at 4.

⁴⁵² Ibid.

⁴⁵³ See Figure 2.4

⁴⁵⁴ *But see* Subminimum Wages: Impacts on the Civil Rights of People with Disabilities," U.S. Commission on Civil Rights 2020 Statutory Enforcement Report, Sept. 2020, at p. 170, and 172-173.

CHAPTER 3: SOUTH CAROLINA BACKGROUND

Current Statistics and Overview

In 2018, South Carolina had “the sixth highest unemployment rate for people with disabilities in the country.”⁴⁵⁵ For comparison, South Carolina was also considered one of the highest in the country for its unemployment rate for individuals with disabilities in 2019, with 32.6 percent percent of people with disabilities being employed.⁴⁵⁶ According to the 2020 Annual Disability Statistics Compendium and United States Department of Labor, South Carolina continues to have one of the highest unemployment rates for people with disabilities in the country.⁴⁵⁷ As of 2020, there are 724,298 individuals with disabilities in South Carolina and of those 34.3 percent are employed, compared to 76.8 percent of people without disabilities who were are employed at the time.⁴⁵⁸ Of those who are employed with disabilities, 2,187 of those individuals were in work settings earning subminimum wages, under section 14(c) of the Fair Labor Standards Act.⁴⁵⁹⁴⁶⁰

To additionally supplement the 2020 statistics, Mr. Ralph Courtney of the Tri-Development Center spoke at the Committee briefing in February 2021, noting that their services provided “employment services to over 400 individuals and residential supports to almost 200 individuals in a variety of settings. 78 individuals served are receiving subminimum wages for the work they perform.”⁴⁶¹ Importantly, the concern that Mr. Courtney highlighted was that no one has identified a “measurable way” to calculate compensation for those working with disabilities, beyond simply looking at productivity.⁴⁶² Though the assumption is that people with disabilities will have low productivity and therefore not meet the expected contribution threshold to earn the national minimum wage, his experience demonstrated that workers with disabilities are in fact “engaged, dependable, very productive, and highly motivated.”⁴⁶³ There are multiple other barriers that could be the reasons behind why there is a higher number of unemployment among individuals who are disabled in South Carolina; those reasons were highlighted in State Representative Collins’ testimony at the December 2020 briefing as well as in the South Carolina Employment First Study Committee Report, detailed below.⁴⁶⁴ Some of these reasons involve “employer misconceptions,

⁴⁵⁵ South Carolina Employment First Study Committee Report, p. 3, <https://www.scstatehouse.gov/CommitteeInfo/EmploymentFirstStudyCommittee/SC%20Employment%20First%20Study%20Committee%20Report.pdf>

⁴⁵⁶ *Ibid.*, 7.

⁴⁵⁷ <https://www.hirenesc.org/stats>

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Supra* note 455 at 7.

<https://www.scstatehouse.gov/CommitteeInfo/EmploymentFirstStudyCommittee/SC%20Employment%20First%20Study%20Committee%20Report.pdf>

⁴⁶¹ February 4, 2021 Briefing Summary, p. 1.

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*

⁴⁶⁴ Nov 18 2020 Briefing, p. 6.

no hiring initiative in South Carolina, the lack of support for business and lack of data collection”, among many others.⁴⁶⁵

The effect of inclusion is powerful on those working who have disabilities. Justin Barrerro, IT staff for SOS Care, was diagnosed with Autism Spectrum Disorder (ASD) and selective mutism in his mid 20s, and is currently 30 years old.⁴⁶⁶ He shared with the committee how he had volunteered in the SOS office, helping with general office tasks, data entry, community events, and non-profit fundraisers.⁴⁶⁷ After completing his Associate Degree in Computer Technology, SOS hired him full-time, which provided him with benefits and pays him a standard wage.⁴⁶⁸ He specifically noted to the Committee that knowing that he could be paid less because of his disability would be “detrimental to his character”⁴⁶⁹

South Carolina’s Legislative History

The Employment First Initiative Act and Employment First Study Committee

In order to tackle these barriers and improve employment rates for those with disabilities, South Carolina introduced its original bill called the Employment First Initiative Act and introduced it to the SC House of Representatives on April 4, 2017.⁴⁷⁰ With amendments “by Chairman Sandifer in House LCI that changed the language to a mandatory requirement to encouraging an option for the state agencies and political subdivisions,” the bill unanimously passed the House LCI Subcommittee and Committee, and also passed Senate LCI Subcommittee and Committee unanimously.⁴⁷¹ However, State Senator Shane Martin was not willing to pass the bill unless the Enabling Authority section, establishing the South Carolina Employment First Study Committee was established in May 2018.⁴⁷²

The First Study Committee was created “for the purpose of studying and evaluating the need for an Employment First Initiative Act.”⁴⁷³ The Enabling Authority specified the composition of the committee and the timeline for submitting its findings to the Governor, Senate, and House of Representatives by May 1, 2019.⁴⁷⁴ According the Enabling Authority, the committee conducted four meetings in the 2019 legislative session to formulate their findings, “issues impacting employment outcomes for South Carolinians with disabilities, and heard presentations from, and engaged in discussion with, representatives from [advocacy] organizations.”⁴⁷⁵ At the conclusion

⁴⁶⁵ Ibid., 6.

⁴⁶⁶ February 4, 2021 Briefing Summary, p. 4.

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid., 2.

⁴⁶⁹ Ibid., 4.

⁴⁷⁰ *Supra* note 455 at 4.

⁴⁷¹ Ibid., 5.

⁴⁷² Ibid., 4-5.

⁴⁷³ Ibid., 4.

⁴⁷⁴ Ibid.,

⁴⁷⁵ Ibid., 6.

of its discussion and analysis, the committee issued a comprehensive report of its findings regarding the proposed Employment First Initiative Act.⁴⁷⁶

The purpose of the Employment First Initiative Act

The idea of “Employment First” means “that employment should be the *first* option available to people with disabilities, and a set of ideas for achieving that goal. Individuals should have the opportunity to be productive members of an integrated society.”⁴⁷⁷ By possibly introducing the Employment First Initiative Act, South Carolina would join 32 other states who have passed similar policies and legislation.⁴⁷⁸ This legislation assists with addressing several barriers that potentially hinder people with disabilities from becoming fully integrated members of the work force and society.⁴⁷⁹ One of the barriers that affect individuals with disabilities highlighted in the First Study Committee’s report is that “disability employment is not a state priority”, in that South Carolina should prioritize “true integration” of all of its workforce.⁴⁸⁰ The South Carolina Employment First Initiative Act is the first proposed South Carolina law solely focusing on this issue.⁴⁸¹ Another hurdle is that there are numerous employer misconceptions facing people with disabilities; for example, one misconception is that employers cannot fire employees with disabilities, however, employer would in fact “follow the same performance guidelines as any other employee.”⁴⁸² The Employment First legislation’s goal is to bridge the gap between employers and employees with disabilities by providing employment and related benefits for those individuals, while also assisting businesses to improve their diversity.⁴⁸³

State Representative Collins further explained that the goal of the Employment First Initiative Act was to : one, to encourage companies, especially the government sector, to look at people with disabilities first for employment in order to address the unemployment rate, and two, to create a commission that would regularly report to the General Assembly about the progress of ending of sub-minimum wages and employment.⁴⁸⁴ The proposed bill will set an example in the public employment sector with the hopes that the private sector will follow its lead, though as Representative Collins noted, the private companies may be a “roadblock” for the bill’s implementation.⁴⁸⁵ Representative Collins has now reintroduced the proposed bill for the current session as state bill H3244.⁴⁸⁶

⁴⁷⁶ Ibid., 6; *see also* p. 21-23 for the original text of the proposed bill

⁴⁷⁷ Ibid., 3.

⁴⁷⁸ Ibid., 3, 8.

⁴⁷⁹ Ibid., 9.

⁴⁸⁰ Ibid., 10. The First Study Committee noted multiple other barriers and related benefits to each, p. 9-13.

⁴⁸¹ Ibid.,

⁴⁸² Ibid.

⁴⁸³ Ibid., 13.

⁴⁸⁴ Nov 18 2020 Briefing, p. 2,3.

⁴⁸⁵ Nov 18 2020 Briefing, p. 4, 9.

⁴⁸⁶ <https://www.scstatehouse.gov/billsearch.php?billnumbers=3244&session=124&summary=B> ; *see article on reintroduction here:* https://www.statehousereport.com/2020/12/11/news-brief-bill-seeks-to-reverse-outdated-employment-law-on-disabled/?utm_source=wysija&utm_medium=email&utm_campaign=20_1211_issue

South Carolina's proposed Section 14(c) phase out

Section 14(c) of the Fair Labor Standards Act of 1938 permits employers “after receiving a certificate from the United States Department of Labor's Wage and Hour Division, to pay special minimum wages that are less than the federal minimum wage to workers who have disabilities, for the work being performed.”⁴⁸⁷ In order to address the 2,900 South Carolians, as of 2020, who were employed in an environment that could pay them subminimum wages, on February 9, 2021, South Carolina introduced legislation, S. 533, to its Committee of Labor, Commerce, and Industry. S. 533 would phase out Section 14(c), prohibiting the use of Section 14(c) certificates to pay individuals with disabilities subminimum wages.⁴⁸⁸ This proposed joint resolution would be effective as of August 1, 2024.⁴⁸⁹ Mr. Ralph Courtney, Executive Director of Tri-Development Center in South Carolina explained that phasing out the 14(c) certificates would be a helpful step as long as those policies were not replaced by an alternative, and issuing 14(c) certificates was phased out completely over time.⁴⁹⁰

Federal legislation and its obligations

ADA's Integration Mandate

South Carolina's proposed legislation falls within the federal requirements for integration and inclusivity. Under the Americans with Disabilities Act (ADA), discrimination based on a person's disability is prohibited.⁴⁹¹ This prohibition requires that public entities “provide services in the most integrated setting appropriate to the needs of the individual with a disability,” in which an integrated setting “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.”⁴⁹² The *Olmstead* decision explained that under Title II of the ADA, states are required to include those with mental disabilities in the community rather than in institutions, as long as specified conditions are met, the individual's consent is received, and reasonable accommodation is available.⁴⁹³ The *Lane* case also complements *Olmstead* as it held that “sheltered workshops that deliver employment services in segregated environments violated the ADA”, as noted in his testimony by Peter Cantrell of Protection and Advocacy (P&A) for People with Disability, South Carolina.⁴⁹⁴

However, currently South Carolina's workforce is segregated in employment and services available to those with disabilities; individuals with disabilities tend to work with others who also have disabilities in dead-end service jobs that do not provide for growth, training, or career

⁴⁸⁷ Subminimum Wage provisions, 14(c), <https://www.dol.gov/agencies/whd/special-employment>

⁴⁸⁸ S. 533, https://www.scstatehouse.gov/sess124_2021-2022/bills/533.htm

⁴⁸⁹ Ibid.

⁴⁹⁰ February 4, 2021 Briefing Summary, p. 2.

⁴⁹¹ 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d).

⁴⁹² 42 U.S.C. § 12132; Ex. Ord. No. 13217, June 18, 2001, 66 F.R. 33155, Section 2; see also 28 C.F.R. Pt. 35 App. B (discussing paragraphs (d) and (e) of 28 C.F.R § 35.130).

⁴⁹³ *Olmstead v. L.C.*, 527 U.S. 581 (1999) (the "*Olmstead* decision"); 42 U.S.C. § 12132.

⁴⁹⁴ *Lane v. Brown*, 2012, SAC Briefing June 26, 2020, p. 2; also see First Study Committee Report, p. 16.

elevation.⁴⁹⁵ Thus, the proposed legislation will assist South Carolina’s employment system to meet the ADA’s integration mandate, and importantly help workers with disabilities to “interact with diverse people” in their workplace.⁴⁹⁶

The “Final Rule” Requirements

The federal agency administering Medicaid has issued regulations to supplement the integration initiatives and vision through the Medicaid Final Rule, which states that “people on these Home and Community-Based Services (HCBS) waivers are often encouraged to work in segregated settings.”⁴⁹⁷ Integration should be ensured by allowing the individual with disabilities freedom of movement and to make informed decisions, among other professional expectations such as negotiating opportunity for their employment agreements.⁴⁹⁸ It is important to note that the Final Rule focuses on the “individual experience and outcomes” as well as the actual, physical setting of each individual.⁴⁹⁹ Without the proposed legislation for Employment First, South Carolina currently does not have rules in place for a Final Rule.⁵⁰⁰

The Workforce and Innovation Opportunity Act, Vocational Rehabilitation, and Sheltered Workshops

In addition to integration requirements and phasing out legislation for all individuals with disabilities, Congress passed the Workforce Innovation and Opportunity Act (WIOA), which focuses on encouraging inclusivity for youth under 24 years old.⁵⁰¹ This type of youth integration is requiring youth have access to “receive transition services under the Individuals with Disabilities Education Act (IDEA) and/or pre-employment transition services through vocational rehabilitation.”⁵⁰² Under the WIOA, state vocational rehabilitation services agencies must work with youth with disabilities from age 13 to 21, in South Carolina, and provide them with “pre-employment transition services aimed at increasing their employment in competitive integrated jobs.”⁵⁰³

Vocational Rehabilitation provides for Transition Specialist who work with students, helping them find “meaningful employment and then after 90 days of successful employment, South Columbia Department of Disabilities and Special Needs (DDSN) provides individual job coaching services to keep people out of sheltered workshops.”⁵⁰⁴ Only 1 to 5 percent of workers in sheltered workshops ever transition into competitive integrated employment in the community; unfortunately most workers tend to stay in the sheltered workshops lifelong, and they tend to cost

⁴⁹⁵ *Supra* note 455 at 15.

⁴⁹⁶ *Ibid.*, 16.

⁴⁹⁷ *Ibid.*, 16; *see also* 42 C.F.R. § 441.301(c)(4)/441.710(a)(1)/441.530(a)(1).

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*, 17.

⁵⁰² *Ibid.*

⁵⁰³ *Ibid.*

⁵⁰⁴ June 26, 2020 Briefing Summary, p. 3; *supra* note 455 at 66 and 73.

more than double supported employment services as the workshops require long term support with sustained support, according to Ms. Sandy Jordan of Able South Carolina.⁵⁰⁵⁵⁰⁶ The South Carolina Employment First Study Committee noted that “SC Vocational Rehabilitation Department reported their return on investment for last fiscal year which shows that successfully rehabilitated consumers (program participants) will pay back \$5.43 in taxes for every \$1 spent on their rehabilitation, and they will repay the cost for SCVRD services in approximately 3.3 years. That’s a 30 percent annual rate of return on taxpayer investment.”⁵⁰⁷ On the other hand, supported employment services allow for complete integration into society and prepare the individual for increased independence, so less support is required in this setting, while also paying higher gross wages.⁵⁰⁸

Margie Moore Williamson, Executive Director of The Arc of South Carolina, and a mother of an 18-year-old who has experience with Vocational Rehabilitation, explained that the realities of Vocational Rehabilitation can be limiting because access to Vocational Rehabilitation can be restricted and not easily available.⁵⁰⁹

South Carolina’s Current Regular Wage Initiatives

Through companies such as SOS Care, some South Carolina businesses are already providing regular wages at some employers and working towards complete integration.⁵¹⁰ At SOS Care, all those working in their employment program are paid regular wage; this employment program provides individualized employment programs and involves the employee with disabilities in the decision-making process to select where the worker chooses to work.⁵¹¹ Many local businesses contact SOS Care to employ a person with a disability that SOS Care can provide.⁵¹²

The value of integrating individuals with disabilities into society is invaluable. South Carolina has continued to respond by taking actions such as proposing to phase out 14(c) certificates and requirements, and advocating for full integration in addition to personal growth of individual employees with disabilities. Additionally, the current proposed legislation will not only build upon the state’s actions thus far, but will also assist in ensuring that a focus on integration and inclusivity is maintained consistently longer term.

⁵⁰⁵ June 26, 2020, Briefing Summary, p. 1.

⁵⁰⁶ February 4 2021, Briefing Summary, p. 3 (Sarah Pope’s testimony regarding sheltered workshops).

⁵⁰⁷ *Supra* note 455 at 12.

⁵⁰⁸ June 26, 2020, Briefing Summary, p. 1.

⁵⁰⁹ *Ibid.*, 2-3.

⁵¹⁰ February 4, 2021 Briefing Summary, p. 2-3.

⁵¹¹ *Ibid.*, 3.

⁵¹² *Ibid.*

CHAPTER 4: FINDING AND RECOMMENDATION

The Committee believes that Section 14(c) of the Fair Labor Standards Act was well intended but is obsolete. Employment and work is more than a means to earn a living. It provides dignity and is an element of a full and worthy life, something to which people with disabilities are surely entitled. People with intellectual and developmental disabilities who are currently earning subminimum wages under the 14(c) program are not categorically different in level of disability from people with intellectual and developmental disabilities currently working in competitive integrated employment. Other states have phased out the use of the 14(c) and have developed and designed programs for state service providers and other stakeholders to ensure that a competitive integrated employment model does not result in a loss of critical services to individuals with disabilities, including former 14(c) program participants.

Finding

Recognizing the humanity of all our citizens, we the members of the South Carolina State Advisory Committee to the U.S. Commission on Civil Rights state our unanimous support for the ending of Section 14(c) of the Fair Labor Standards Act. Section 14(c) has become unconscionable. It no longer represents the community sentiment, culture, or knowledge of people with disabilities in South Carolina and the remaining providences of the United States. The continuance of this Act has negative and detrimental consequences. Ethically, its continuance in any form cannot be supported by this Committee.

However well-intentioned it may have been upon its enactment in 1938, Section 14(c), which allows subminimum wages to be paid to people with disabilities, currently does a disservice to most of the people it was originally intended to serve. In all but the most extreme situations of individual disability, the rationale for the payment of subminimum wages is outdated for modern society and violates the intent, if not the letter, of the law contained in the American Disabilities Act, requiring the integration of people with disabilities into the workplace, and other federal civil rights advocacy statutes designed to leverage equal opportunities for people with disabilities. In addition, the lack of transparency and accountability required of 14(c) certificate holders makes it almost impossible to measure the individual or collective impact and fidelity of these employment programs.

Recommendation

The South Carolina General Assembly should pass legislation that prohibits employers from paying subminimum wages for South Carolinians with disabilities. The Federal legislation no longer reflects the capability and proven skills of people with disabilities. This legislation should have a planned phase-out period that focuses on transitioning individuals currently working in 14(c) certificate programs into other more competitive integrated employment. The phased repeal of 14(c) must not reflect a retreat in investments and support for employment success of persons with disabilities. The evidence shows that people with disabilities work the same hours, complete the same operative required tasks, and succeed with all given obligations.

Moreover, during this phase-out, there should be incentives for the development of public private partnerships that provide ongoing education and training for people living with disabilities integration into the workplace.

The United States Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957, reconstituted in 1983, and reauthorized in 1994. It is directed to investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices; to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; to appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; to serve as a national clearinghouse for information with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin; to submit reports, findings, and recommendations to the President and Congress; and to issue public service announcements to discourage discrimination or denial of equal protection of the laws.

The State Advisory Committees

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; to receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; to forward advice and recommendations to the Commission, as requested; and to observe any open hearing or conference conducted by the Commission in their states.

State Advisory Committee Reports

The State Advisory Committee reports to the Commission are wholly independent and are reviewed by Commission staff only for legal and procedural compliance with Commission policies and procedures. SAC reports are not subject to Commission approval, fact-checking, or policy changes.

This report is the work of the Massachusetts State Advisory Committee to the U.S. Commission on Civil Rights. The views expressed in this report and the findings and recommendations contained herein are those of the State Advisory Committee members and do not necessarily represent the views of the Commission or its individual members, nor do they represent the policies of the U.S. Government.