

# SUBMINIMUM WAGES

IMPACTS ON THE CIVIL RIGHTS OF PEOPLE WITH DISABILITIES

SEPTEMBER 2020

U.S. COMMISSION ON CIVIL RIGHTS

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- 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.
- 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.
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<sup>1</sup> 42 U.S.C. §1975a.

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\* This report was voted upon on 6/19/20, prior to Commissioner Adams' appointment.

Subminimum Wages:  
Impacts on the Civil  
Rights of People with  
Disabilities

**U.S. Commission on Civil Rights  
2020 Statutory Enforcement Report**





## UNITED STATES COMMISSION ON CIVIL RIGHTS

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### Letter of Transmittal

September 17, 2020

President Donald J. Trump  
Vice President Mike Pence  
Speaker of the House Nancy Pelosi

On behalf of the United States Commission on Civil Rights (“the Commission”), I am pleased to transmit our briefing report, *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*. The report is also available in full on the Commission’s website at [www.usccr.gov](http://www.usccr.gov).

This report examines current implementation of Section 14(c) of the Fair Labor Standards Act of 1938, which directs the U.S. Secretary of Labor to grant special certificates allowing for the employment of workers with disabilities below the federal minimum wage to prevent reduced employment opportunities. The Commission collected data and testimony from Members of Congress, Labor and Justice Department officials, self-advocates and workers with disabilities, family members of people with disabilities, service providers, current and former public officials, and experts on disability employment and data analysis; conducted two field visits to employment and service provision sites supporting workers with disabilities earning subminimum and competitive wages; and received thousands of public comments both in favor of and opposed to the 14(c) program.

The primary recommendation approved by the Commission majority following this inquiry was that Congress should repeal Section 14(c) with a planned phase-out period to allow transition among service providers and people with disabilities to alternative service models prioritizing competitive integrated employment.

The Commission majority approved key findings including the following: As currently utilized, the U.S. Department of Labor has repeatedly found 14(c) providers limiting people with disabilities participating in the program from realizing their full potential while allowing providers and associated businesses to profit from their labor. This limitation is contrary to 14(c)’s purpose. Persistent failures in regulation and oversight of the 14(c) program by government agencies including the Department of Labor and Department of Justice have allowed and continue to allow the program to operate without satisfying its legislative goal to meet the needs of people with disabilities to receive supports necessary to become ready for employment in the competitive economy.

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. State-level phase outs of the use of the 14(c) program have been developed and designed 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.

The Commission majority voted for key recommendations, in addition to recommending that Congress repeal Section 14(c) with a planned phase-out period. The phased repeal of 14(c) must not reflect a retreat in federal investments and support for employment success of persons with disabilities but rather a reconceptualization of the way in which the federal government can enhance the possibilities for success and growth for people with disabilities.

Congress should expand funding for supported employment services and prioritize capacity building in states transitioning from 14(c) programs. Now and during the transition period of the Section 14(c) program, Congress should assign civil rights oversight responsibility and jurisdiction, with necessary associated fiscal appropriations to conduct the enforcement, either to the Department of Labor or to the Department of Justice Civil Rights Division. Congress should also require that the designated civil rights agency issue an annual report on investigations and findings regarding the 14(c) program. During the phase-out period, Congress should require more stringent reporting and accountability for 14(c) certificate holders, and following the phase out should continue to collect data on employment outcomes of former 14(c) employees.

The Department of Justice should increase enforcement of the *Olmstead* integration mandate to determine whether state systems are inappropriately relying on providers using 14(c) certificates to provide non-integrated employment in violation of *Olmstead*. The Department should issue guidance, open more investigations, and litigate where voluntary compliance cannot be achieved.

We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,



Catherine E. Lhamon

Chair

## Table of Contents

ACKNOWLEDGEMENTS .....	v
EXECUTIVE SUMMARY .....	vi
Findings and Recommendations .....	xv
Highlighted Findings .....	xv
Highlighted Recommendations.....	xvi
Briefing Agenda.....	xvii
CHAPTER 1: APPLICABLE LAW & POLICY CONSIDERATIONS.....	1
Legislative History and Provisions of Section 14(c) .....	1
Employer Requirements.....	3
Developments in Civil Rights Protections.....	11
Integration Mandate .....	18
Wage Discrimination Issues .....	24
Developmental Disabilities Assistance and Bill of Rights Act of 2000 .....	30
Workforce Innovation and Opportunity Act of 2014 .....	31
Alternative Policies and Reforms to Section 14(c).....	37
Phasing Out 14(c) with Transformation to Competitive Integrated Employment Act.....	38
Raising Subminimum Wages Over Time .....	45
Federal Tax Credits or Other Federal Funding .....	49
Employment First Initiatives .....	51
Enhancing 14(c).....	56
CHAPTER 2: DATA AND ANALYSIS.....	59
Summary of Currently Available Data .....	59
Data Focusing on People with Disabilities and Their Employment.....	63
Employment and Labor Force Participation Rates of People with Disabilities.....	64
Available Intersectional Data.....	66
Data about 14(c) Certificate Holders and Employees with Disabilities .....	68
Data about Transitioning to Competitive Integrated Employment.....	72
Data Received From Public Comments.....	87
Public Comments Favoring Section 14(c) .....	91
Comments Against 14(c) .....	98
Comments Regarding Transition or Other Policies .....	100

CHAPTER 3: THE FEDERAL GOVERNMENT’S ROLE AND RESPONSIBILITIES.....	103
Department of Labor Wage and Hour Division.....	103
Department of Justice .....	123
Guidance and Technical Assistance Regarding the ADA Integration Mandate & Informed Choice .....	124
Investigations and Litigation.....	128
Equal Employment Opportunity Commission (EEOC).....	131
Centers for Medicare & Medicaid Services – Department of Health and Human Services: Home and Community Based Settings Rule.....	132
U.S. AbilityOne Commission .....	137
CHAPTER 4: STATES AND SUBMINIMUM WAGE LAWS.....	141
Employment Rates .....	142
Trends in Wages .....	145
Integration.....	147
States that Allow Subminimum Wages under Section 14(c).....	148
Overview.....	148
Virginia (Site Visit).....	149
Arizona.....	166
Missouri .....	171
State Initiatives to Phase Out Subminimum Wages Permitted under Section 14(c) of the Fair Labor Standards Act .....	178
Overview of States that Are Eliminating or Have Eliminated Subminimum Wages .....	178
Vermont (Site Visit).....	180
Maine .....	208
Oregon.....	212
CHAPTER 5: FINDINGS AND RECOMMENDATIONS .....	219
Findings.....	219
Recommendations.....	223
Commissioners’ Statements, Dissents, and Rebuttals .....	225
Statement of Commissioner David Kladney.....	225
Dissenting Statement and Rebuttal of Commissioner Gail L. Heriot.....	230
Dissenting Statement of Commissioner Peter N. Kirsanow .....	237
Appendix A: Settlement Agreements Revoking 14(c) Certificates .....	275



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With the assistance of Attorney-Advisor Pilar Velasquez McLaughlin, the Commission's General Counsel Maureen E. Rudolph reviewed and approved the report for legal sufficiency.

The Arizona Advisory Committee to the U.S. Commission on Civil Rights collected and provided testimony on related civil rights issues within its jurisdiction.

## EXECUTIVE SUMMARY

Congress enacted the Fair Labor Standards Act in 1938 as part of the New Deal. One of the Act’s provisions, Section 14(c) (hereinafter “Section 14(c)” or “14(c)”) directs the U.S. Secretary of Labor to grant special certificates allowing for the employment of workers with disabilities below the federal minimum wage “to the extent necessary to prevent curtailment of opportunities for employment.”<sup>1</sup> The Fair Labor Standards Act is the federal law that sets the federal minimum wage and regulates the number of hours per week that employees are permitted to work, and it currently sets the federal minimum wage at \$7.25 an hour.<sup>2</sup> State or local minimum wages cannot be less than the federal minimum wage.<sup>3</sup> Exceptions to the federal minimum wage include apprentices<sup>4</sup> and students<sup>5</sup> (generally temporary statuses), and persons with disabilities (usually a lifelong individual characteristic).<sup>6</sup> The Fair Labor Standards Act’s implementing regulations require 14(c) employers to apply for a certificate and submit to federal monitoring to ensure that the subminimum wages are used if and only if workers are “in fact disabled for the work they are to perform.”<sup>7</sup> The Commission’s research shows that Section 14(c) is antiquated as it was enacted prior to our nation’s civil rights laws, and its operation in practice remains discriminatory by permitting payment of subminimum wages based on disability without sufficient controls to ensure that the program operates as designed “to the extent necessary to prevent curtailment of opportunities for employment.”<sup>8</sup> Although Congress enacted the program with good intentions, the Department of Labor’s enforcement data as well as several key civil rights cases and testimony from experts show that with regard to wage disparities, the program is rife with abuse and difficult to administer without harming employees with disabilities, as reflected in over 80 percent of cases

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<sup>1</sup> Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 214(c) c. 676, § 14, 52 Stat. 1060; *see also*, U.S. Dep’t of Labor Wage and Hour Division, 14(c) Certificate Holders, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders> (last accessed May 21, 2020).

<sup>2</sup> 29 U.S.C. § 206(a)(1).

<sup>3</sup> *Id.* and *see* 29 U.S.C. § 203(d) (definition of “employer”).

<sup>4</sup> 29 U.S.C. § 214(a).

<sup>5</sup> 29 U.S.C. § 214(b).

<sup>6</sup> 29 U.S.C. § 214(c); *see also*, Finn Gardiner, Communications Specialist, Lurie Institute for Disability Policy, Brandeis University, Testimony, *Briefing Before the U.S. Comm’n on Civil Rights, Washington, DC*, Nov. 15, 2019, transcript, pp. 145-146 (hereinafter cited as “*Subminimum Wages Briefing*”) (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).

<sup>7</sup> 29 C.F.R. § 525.12(b).

<sup>8</sup> *See infra* note 66.

investigated.<sup>9</sup> However, the Commission has also received broad testimony in favor of 14(c), which is also discussed extensively herein.<sup>10</sup>

Programs operated pursuant to section 14(c) have at times contributed to segregation of persons with disabilities, as some employers who hold a Section 14(c) certificate have employed people with disabilities in separate work centers,<sup>11</sup> or sheltered workshops,<sup>12</sup> where the employees are mainly employed with other people with disabilities and not integrated into a broader community or work setting.<sup>13</sup> Regarding integration, the Commission’s research shows that Section 14(c) does not require, but has often resulted in, persons with disabilities being segregated into sheltered workshops without contact with persons without disabilities, except in a support or supervisory role.<sup>14</sup> Moreover, reviewing thousands of public comments received—both in favor of and against 14(c)—along with expert testimony, academic medical research, as well as persons interviewed during site visits also showed that persons with disabilities benefited greatly from being in

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<sup>9</sup> See *infra* notes 658-660.

<sup>10</sup> See, e.g., *infra* notes 556-573.

<sup>11</sup> As of January 1, 2020, there were 1,558 14(c) certificates either issued or pending renewal by the U.S. Department of Labor’s Wage and Hour Division. 1,452 of those certificates (93%) were held by Community Rehabilitation Programs; See, 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](https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf) (finding that the majority of people with disabilities earning a subminimum wage work in congregate work centers operated by Community Rehabilitation Programs); see also 29 U.S.C. § 705(4) (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”); Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, *Interim Report*, Sept. 15, 2015, pp. 6-7, <https://www.dol.gov/odep/pdf/20150808.pdf> (“federal data confirms that most all people currently working under Section 14(c) subminimum wage certificates are working for sheltered workshops (also called community rehabilitation programs or work centers) that typically receive public funding, including federal Medicaid and Vocational Rehabilitation (VR) dollars, to provide employment-related habilitation and rehabilitation services to individuals with disabilities”).

<sup>12</sup> A sheltered workshop is a work center where people with disabilities work segregated from people without disabilities. The Wage and Hour Division issues 14(c) certificates to four different types of entities, for-profit business establishments, hospital/residential care facilities, school work experience programs, and nonprofit community rehabilitation programs. Many 14(c) certificate holders have historically employed people with disabilities in segregated work centers or sheltered workshops; See, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, *Interim Report*, Sept. 15, 2015, p. 69, <https://www.dol.gov/odep/pdf/20150808.pdf>.

(“For the past several decades, sheltered workshops have continued to operate as facility-based vocational service programs attended by adults with disabilities thought to be unable to achieve [competitive integrated employment] outcomes. Sheltered employment characteristically offer opportunities for simple work activities such as assembling, packaging, and light manufacturing for which individuals are paid a wage meant to be commensurate with productivity”).

<sup>13</sup> Alison Barkoff, Director of Advocacy, Center for Public Representation, Testimony, *Subminimum Wages Briefing*, pp. 40-43.

<sup>14</sup> See *infra* notes 520-524.

community employment settings and not being isolated.<sup>15</sup> This showing comports with the integration mandate of the Americans with Disabilities Act and past findings of the Commission.<sup>16</sup>

Since 1938, many thousands of sheltered workshops where employees are paid less than minimum wages have been certified under Section 14(c), and although their number is dwindling, according to the Department of Labor, there are still over 1,500 such workshops employing over 100,000 persons with disabilities, although an exact count of the total number of individuals working for subminimum wages is unavailable and other estimates are much higher.<sup>17</sup> Some states have prohibited payment of subminimum wages and sheltered workshops altogether, but according to 2020 federal data, there are currently 14(c) certificate holders in 46 states and the District of Columbia.<sup>18</sup> That is, all states except four (Maine, New Hampshire, Rhode Island and Vermont) currently have at least one 14(c) certificate allowing the employer to pay subminimum wages.<sup>19</sup> Four other states (Alaska, Maryland, Oregon and Texas) are in the process of phasing out subminimum wages, although they currently still have operating 14(c) certificates.<sup>20</sup>

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<sup>15</sup> See *infra* notes 574-578.

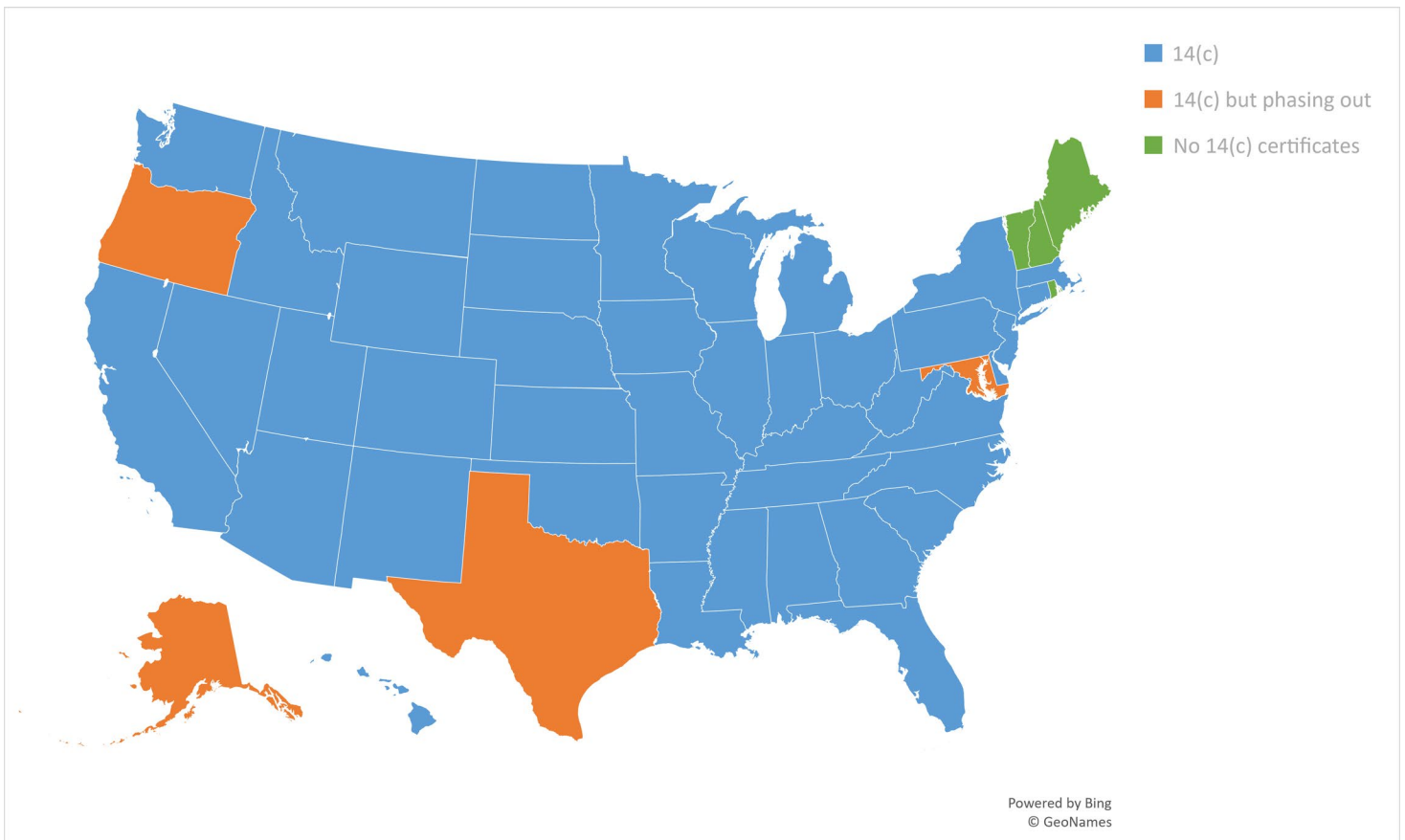
<sup>16</sup> See *infra* notes 192-195.

<sup>17</sup> See *infra* notes 443 (historic figures), 465 (current number of 14(c) workshops), and 440-444 (current number of 14(c) employees).

<sup>18</sup> U.S. Dep't of Labor Wage and Hour Division, 14(c) Certificate Holders, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders> (last accessed Apr. 6, 2020).

<sup>19</sup> *Ibid.*; Commission Staff Research.

<sup>20</sup> See Oregon S.B. 494 (enacted Sept. 20, 2019) (payment of subminimum wages will be prohibited after 2023); see also, *infra* notes 1280-1287 (discussing Oregon's phase-out plan enacted after litigation); N.H. Code Ann. Tit. 23 § 279:22; Md. Code Ann. Tit. Labor and Employment § 3-414; Alaska Code Ann. Tit. 8 § 15.120; Or. Code Ann. Tit. 16 § 653.030; Tex. Code Ann. Tit. 8 § 122.0075-0076.

**Figure ES.1: States with Current or Pending 14(c) Certificates and States Phasing out 14(c)**

Source: U.S. Dep't of Labor, Data as of January 1, 2020, Chart generated by Commission Staff

To hear from currently affected stakeholders and to evaluate the civil rights implications of 14(c), the Commission collected data as well as testimony from five panels of experts, employers, advocates, a member of Congress and a lobbyist, an official from the Department of Labor, former Department of Justice officials and impacted community members, some of whom had personally worked for subminimum wages in 14(c) workshops and had since become national leaders.<sup>21</sup> The Commission reviewed a series of federal agency and academic studies of 14(c). A Subcommittee of the Commission conducted two site visits: one to an employer in Virginia who has a 14(c) certificate, enabling the employer to pay subminimum wages to persons with disabilities,<sup>22</sup> and the other to sites in Vermont, where subminimum wages have been eliminated and persons with

<sup>21</sup> *Subminimum Wages Briefing*, transcript, *passim*, <https://www.usccr.gov/calendar/2019/11-19-Transcript-Commission-Business-Meeting.pdf>; U.S. Comm'n on Civil Rights, *Briefing Agenda, Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*, Nov. 15, 2019, <https://www.usccr.gov/press/2019/11-05-Agenda-Subminimum-Wages.pdf>.

<sup>22</sup> See *infra* notes 829-981, (Members of the Subcommittee were Commissioner Debo Adegbile, Commissioner Gail Heriot, Subcommittee Chair David Kladney, and Commission Chair Catherine Lhamon).

disabilities are now employed through other programs.<sup>23</sup> The Commission evaluated these two states and five others that illustrate various types of programs for employment of persons with disabilities, ranging from 14(c) programs, to phase-out programs,<sup>24</sup> and to states that have completely phased out 14(c).<sup>25</sup>

The Commission also invited public comments and within 30 days after the briefing, the Commission received the highest volume of public comments the Commission has ever received when covering any topic: over 9,700 public comments (about 8,000 as petition signatures and 1,700 as individual public comments) about the 14(c) certificate program.<sup>26</sup> The Commission heard from proponents and opponents of the program and reviewed story after story of people with a disability or disabilities who were once presumed to be only capable of working for subminimum wages in a sheltered environment, who transitioned to and excelled in competitive integrated employment. The Commission also heard and received thousands of comments, mainly from impacted parents, stating that 14(c) is needed to protect employment opportunities for people with disabilities. This report analyzes these thousands of public comments as part of the data the Commission collected and evaluated.

Chapter 1 sets forth an analysis of applicable federal law and civil rights implications. The chapter summarizes and evaluates the 1938 law as well as applicable civil rights laws. The main issues arising under the Americans with Disabilities Act are whether there is employment discrimination and whether there is compliance with the mandate that whenever possible, persons with disabilities should receive services in integrated settings.<sup>27</sup> Although there are limitations for reasonableness, the Americans with Disabilities Act generally requires integration of persons with disabilities and prohibits discrimination in employment.<sup>28</sup> This chapter also evaluates arguments for and against 14(c). The Commission received testimony from parents who felt that their adult children with disabilities should be able to choose to have a safe place to be during the day and have the dignity of work, and they stated that sheltered workshops paying subminimum wages provided that.<sup>29</sup> On the other hand, persons with disabilities, including some with direct experience with 14(c); state-based experts; and civil rights litigators including former Department of Justice staff indicate that the program is not only rife with abuse, but also that the program itself is exploitative and

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<sup>23</sup> See *infra* notes 1055-1257.

<sup>24</sup> See *infra* notes 828-1039 (discussing Arizona, Missouri and Virginia).

<sup>25</sup> See *infra* notes 1040-1302 (discussing Maine, Oregon and Vermont).

<sup>26</sup> See *infra* notes 552-555.

<sup>27</sup> See *infra* notes 177-229 (Chapter 1, discussion of applicable law, including the reasonableness standard the Supreme Court has applied to the Americans with Disabilities Act).

<sup>28</sup> See *infra* note 176.

<sup>29</sup> See *infra* note 556.

discriminatory.<sup>30</sup> Persons with disabilities who have transitioned out of 14(c) workshops were adamantly against the program.<sup>31</sup> Further, some states have successfully transitioned employment of persons with disabilities to “competitive integrated employment,” in which persons with disabilities are paid at least minimum wage and are not segregated.<sup>32</sup> In contrast, some employers, family members, and persons with disabilities feel strongly that eradication of the program would take away their choice as well as the opportunity to earn a paycheck and work in a supportive environment.<sup>33</sup> As mentioned, the majority of the public comments the Commission received were from parents who support the continued operation of 14(c) workshops unchanged.<sup>34</sup>

Chapter 1 also provides information about Community Rehabilitation Programs and discusses how individuals’ Medicaid funded supports may be used by 14(c) and other employers through different policy iterations.<sup>35</sup> This chapter also surveys and discusses various policy options. For example, in recent years, several bills have been introduced in the U.S. Congress that have included provisions for reforming or phasing out and eventually eliminating Section 14(c) and the payment of subminimum wages to people with disabilities.<sup>36</sup> Some bills would phase out and eliminate Section 14(c), while others focus federal funding or tax credits on increasing opportunities for persons with disabilities to access competitive integrated employment.<sup>37</sup> As shown by the map above and the more detailed data herein, many states are also undergoing these types of transitions through a variety of policy models. Because there are millions of persons with disabilities with a wide range of skill sets, and with many individual and community factors at stake, it is not possible to generalize about these programs or predict the employment outcomes for all.<sup>38</sup> However, new technology as well as new programs being developed in some states show that for many people currently employed in 14(c) workshops, transitioning to competitive integrated employment is an attainable goal.<sup>39</sup> This transition may be aided by the provision of accommodations such as a job coach, peer support, or specialized training or other supports that allow persons with disabilities

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<sup>30</sup> See *infra* note 574.

<sup>31</sup> See *infra* notes 221.

<sup>32</sup> See *infra* notes 1045-1051.

<sup>33</sup> See *infra* notes 557-558.

<sup>34</sup> See *infra* notes 556-584.

<sup>35</sup> See *infra* note 212.

<sup>36</sup> See *infra* notes 338-396.

<sup>37</sup> *Id.*

<sup>38</sup> See *infra* notes 1009-1039 (discussing subminimum wages in Missouri) and notes 704-705 (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).

<sup>39</sup> See *infra* notes 1040-1054.

to effectively work in integrated settings.<sup>40</sup> Data shows that such supported employment leads to higher employment rates for people with intellectual and developmental disabilities.<sup>41</sup>

To understand the available data, Chapter 2 summarizes and analyzes available national, state, and local data. At the national level, the most recent Census data, based on the 2018 American Community Survey, estimated that there were 39,674,679 people with disabilities in the United States, making up 12.6 percent of the total estimated U.S. population.<sup>42</sup> The 2018 American Community Survey also found that only 35.9 percent of persons with disabilities were employed, as compared to 76.6 percent of the total population.<sup>43</sup> Further, unemployment and underemployment correlated with higher poverty rates for people with disabilities, among other impacts.<sup>44</sup> At the Commission’s November 2019 briefing, Jennifer Mathis of the Bazelon Center for Mental Health Law testified that: “People with disabilities continue to participate in the labor force at less than half the rate of people without disabilities, and only about 20 percent of people receiving public mental health services have any form of employment.”<sup>45</sup> Furthermore, data the Commission reviewed showed that between 2017 and 2018, the average wage of a person with a disability working under a 14(c) certificate was \$3.34 per hour<sup>46</sup> and the average number of hours worked was 16 hours per week.<sup>47</sup> This means that the average person with a disability working at a 14(c) certificate holding entity earned just \$53.44 per week, or \$213.76 per month.

The Commission also received testimony as to the dearth of available data about subminimum wages. Chair Neil Romano of the National Council on Disability noted in his testimony that “we collect data on things we view as important, and historically we just don’t count people with disabilities.”<sup>48</sup> However, there is some data, particularly regarding trends. For example, there were at least 1,558 14(c) certificate holders across the country as of January 1, 2020, and that estimate

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<sup>40</sup> See *infra* note 259.

<sup>41</sup> See *infra* notes 227-228; See also Jennifer Mathis, Deputy Legal Director & Director of Policy & Legal Advocacy, Bazelon Center for Mental Health Law, Written Statement for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights, Nov. 15, 2019, at 2-3 (hereinafter Mathis Statement). (regarding the focus in the field on persons with intellectual and developmental disabilities, and belying stereotypes about persons having the most employment challenges); See *infra* note 388 (“the [Microsoft employment] 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”).

<sup>42</sup> U.S. Census Bureau, American Community Survey (2018), Disability Characteristics, Table S1810, <https://data.census.gov/cedsci/table?q=S1810&tid=ACSST1Y2018.S1810>.

<sup>43</sup> 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](https://disabilitycompendium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf)

<sup>44</sup> *Ibid.*

<sup>45</sup> Jennifer Mathis, *Subminimum Wages Briefing*, pp. 199-200.

<sup>46</sup> See *infra* note 455.

<sup>47</sup> See *infra* note 456.

<sup>48</sup> Romano Testimony, *Subminimum Wages Briefing*, p. 38.



has decreased by about two-thirds over the past ten years.<sup>49</sup> Data published on the website of the Wage and Hour Division of the Department of Labor indicates that as of January 1, 2020, an estimated 100,300 people with disabilities were working for 14(c) certificate holders.<sup>50</sup> State and local data provides some information about Medicaid-based supports in Community Rehabilitation Programs, as well as more granular data about transitions to competitive integrated employment. Details and analysis are set forth below in Chapter 2.

Chapter 3 evaluates the role and responsibilities of the federal government. In 2009, the Government Accountability Office critiqued the enforcement procedures of the Wage and Hour Division of the Department of Labor, stating that it did not adequately investigate complaints received.<sup>51</sup> At the Commission's November 2019 briefing, Mary Ziegler, then the Director of Policy of the Wage and Hour Division<sup>52</sup> testified that the Division had increased its enforcement of the rights of employees working in the 14(c) program. Since 2013, the Division had revoked 14(c) certificates from six employers—and none could be shown to have been revoked between 1938 and 2013. During the past 10 years, the Wage and Hour Division also ordered the payment of back wages to 88,034 employees with disabilities in 14(c) workshops.<sup>53</sup> The Commission's research also shows that in the last 10 years the Wage and Hour Division has reviewed an average of approximately eight percent of 14(c) certificate holders and found an average 81 percent violation rate of certificate holders investigated over the ten-year period.<sup>54</sup>

The Wage and Hour Division is limited to enforcing the Fair Labor Standards Act and does not have jurisdiction to enforce civil rights laws such as the Americans with Disabilities Act.<sup>55</sup> Federal enforcement of that statute by other agencies is also examined in Chapter 3. In an apparently unique case, brought by the Equal Opportunity Employment Commission, the Equal Opportunity Employment Commission won a multi-million dollar jury award when it enforced the Americans with Disabilities Act against a former 14(c) employer. Chapter 3 reviews this and other data about the effectiveness of federal government programs, including the work of the Civil Rights Division of the Department of Justice, which also enforces the Americans with Disabilities Act, reflecting

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<sup>49</sup> See *infra* note 598.

<sup>50</sup> U.S. Dep't of Labor Wage and Hour Division, 14(c) Certificate Holders, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders> (last accessed May 21, 2020).

<sup>51</sup> Government Accountability Office, GAO-09-629, Wage and Hour Division Needs Improved Investigative Processes and Ability to Suspend Statute of Limitations to Better Protect Workers Against Wage Theft, pp. 14-33 (Jun. 23, 2009) <https://www.gao.gov/assets/300/291496.pdf>.

<sup>52</sup> Ziegler has since retired from her position, in February 2020. See, e.g., Ben Penn, Two Senior Officials Exit Labor Department's Wage Division, Bloomberg Law (Feb. 4, 2020) <https://news.bloomberglaw.com/daily-labor-report/two-senior-officials-exit-labor-departments-wage-hour-division>.

<sup>53</sup> See *infra* notes 659-661.

<sup>54</sup> See *infra* notes 656-665.

<sup>55</sup> See Response of the Wage and Hour Division to the Commission's Interrogatories.

that much more enforcement and enforcement authority is needed.<sup>56</sup> This chapter also highlights the work of another federal entity, the National Council on Disability, which studied the 14(c) program in 2012 and 2018, and in both instances, found the program to be discriminatory and recommended that it be phased out.<sup>57</sup>

In Chapter 4, the Commission evaluates how subminimum wage policy is manifested at the state level, in six states. The Commission collected information about various iterations of employment policies of persons with disabilities, in three states with 14(c) certificate holders (Virginia, Arizona, and Missouri) and in three states that have transitioned or are in the process of transitioning to competitive integrated employment (Vermont, Maine, and Oregon). This chapter also includes a deeper focus on Virginia and Vermont, based on the Commission Subcommittee's site visits to those states. The Commission undertook site visits to a current 14(c) certificate holder in Springfield, Virginia, and visited people with disabilities working in competitive integrated employment sites in and around Burlington, Vermont. A Subcommittee of Commissioners toured the facilities and met with the management of sites and employees. Commission staff also conducted individual interviews with employees with disabilities and their families to better understand their experiences.<sup>58</sup>

Chapter 4 also includes an over-arching analysis of available data in these states with various types of policies and programs. The Commission's research at the state level indicates that transition from employment of persons with disabilities in 14(c) programs to competitive integrated employment, being paid at least minimum wage and working with persons without disabilities as peers, is possible.<sup>59</sup> Competitive integrated employment is shown to be possible in at least two states in which funding and supports have been in place to ensure that 14(c) workers will not lose their jobs and will have time to learn new skills. Such funding may come from an individual's own Medicaid funds, which are the same funds used in 14(c) settings.<sup>60</sup>

In sum, the state transitions from 14(c) evaluated by the Commission seem promising and illustrate that it is possible to pay persons with disabilities at least minimum wage. However, financial and educational supports may be needed to accomplish these transitions,<sup>61</sup> and different state policies about funding,<sup>62</sup> as well as different state demographics, transportation infrastructure, and

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<sup>56</sup> See *infra* notes 736-759.

<sup>57</sup> Nat'l Council on Disability, National Disability Employment Policy, From the New Deal to the Real Deal: Joining the Industries of the Future pp. 61-98 (2018).

<sup>58</sup> See *infra* notes 829-981 and 1055-1257.

<sup>59</sup> See *infra* notes 1040-1054.

<sup>60</sup> See *infra* notes 780-782.

<sup>61</sup> See *infra* notes 1055-1073, 1281-1292.

<sup>62</sup> See *infra* notes 1021-1029 (Missouri).

economic factors, affect the analyses and choices.<sup>63</sup> As one state agency employee interviewed stated: “One model can’t be the model for all people in any services.”<sup>64</sup> Moreover, the Commission received abundant public comments and testimony from other states indicating that many parents and employers are in favor of 14(c), seeing it as a place of safety and dignity for persons with disabilities. Herein, the Commission takes into account all of this testimony as well as the civil rights implications.

Chapter 5 states the Commissioners’ findings and recommendations based upon the research, as highlighted below.

## **Findings and Recommendations**

### *Highlighted Findings:*

1. In 1938, Congress enacted the exception to the minimum wage requirement for people with disabilities, contained in Section 14(c) of the Fair Labor Standards Act, with a rehabilitative purpose. As currently utilized, the federal Department of Labor has repeatedly found providers operating pursuant to Section 14(c) limiting people with disabilities participating in the program from realizing their full potential while allowing providers and associated businesses to profit from their labor. This limitation is contrary to 14(c)’s purpose.
2. Persistent failures in regulation and oversight of the 14(c) program by government agencies including the Department of Labor and Department of Justice have allowed and continue to allow the program to operate without satisfying its legislative goal to meet the needs of people with disabilities to receive supports necessary to become ready for employment in the competitive economy.
3. 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.
4. The Commission took in bipartisan testimony in favor of keeping the 14(c) program and to end the 14(c) program. Notably, in 2016, both major party platforms included support for legislation ending the payment of subminimum wages to people with disabilities. House Committee on Education and the Workforce Chairman Bobby Scott (D-VA) introduced bipartisan legislation to phase out the 14(c) program. Chair Neil Romano, Republican appointee to the National Council on Disability, and former Republican

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<sup>63</sup> See *infra* notes 1156-1257 (interview notes from Vermont); *Cf. infra* notes 897-981 (interview notes from Virginia).

<sup>64</sup> Notes of the Commission’s General Counsel, quoting Sima Breiterman, Director of Adult Services, Subcommittee Site Visit to Think College at University of Vermont (Mar. 4, 2020).

Governor Tom Ridge, who now leads the National Organization on Disability, both testified that ending the 14(c) program is their shared highest priority.

5. State-level phase outs of the use of the 14(c) program have been developed and designed 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.
6. Increased integration of people with disabilities into the workplace and society is now legally required by the Americans with Disabilities Act and legal precedent, and is facilitated by technological advancements. These developments obviate any need for subminimum wage work.

*Highlighted Recommendations:*

1. Congress should repeal Section 14(c) with a planned phase-out period to allow transition among service providers and people with disabilities to alternative service models prioritizing competitive integrated employment.
2. The phased repeal of 14(c) must not reflect a retreat in Federal investments and support for employment success of persons with disabilities but rather a reconceptualization of the way in which the federal government can enhance the possibilities for success and growth for people with disabilities.
3. Congress should expand funding for supported employment services and prioritize capacity building in states transitioning from 14(c) programs.
4. Now and during the transition period of the Section 14(c) program, Congress should assign civil rights oversight responsibility and jurisdiction, with necessary associated fiscal appropriations to conduct the enforcement, either to the Department of Labor or to the Department of Justice Civil Rights Division. Congress should also require that the designated civil rights agency issue an annual report on investigations and findings regarding the 14(c) program.
5. During the phase-out period, Congress should require more stringent reporting and accountability for 14(c) certificate holders, and following the phase out should continue to collect data on employment outcomes of former 14(c) employees.
6. The Department of Justice should increase enforcement of the Olmstead integration mandate to determine whether more state systems are inappropriately relying too heavily on providers using 14(c) certificates to provide non-integrated employment in violation of Olmstead. The Department should issue guidance, open more investigations, and litigate where voluntary compliance cannot be achieved.

*Below is the agenda from the briefing the Commission held in November 2019 to inform this report:*



U.S. Commission on Civil Rights Public Briefing:

Subminimum Wages: Impacts on the Civil Rights of People with Disabilities

Friday, November 15, 2019

National Place Building, 1331 Pennsylvania Ave NW, Suite 1150, Washington, DC 20425

Also [live-streaming](#)

Expert Panels: 9:00 am – 4:30 p.m. ET

Open Public Comment Session: 5:30 p.m. – 6:30 p.m. ET

## **Briefing Agenda**

- I. Introductory Remarks: Chair Catherine E. Lhamon 9:00 a.m. - 9:10 a.m.
- II. Panel One: The Federal Government’s Role: 9:10 a.m. – 10:30 a.m.
  - U.S. Representative Robert C. “Bobby” Scott, Chairman, House Committee on Education and Labor
  - Mary Ziegler, Assistant Administrator for Policy, Wage and Hour Division, U.S. Department of Labor
  - Neil Romano, Chairman, National Council on Disability
  - Alison Barkoff, Director of Advocacy, Center for Public Representation
- III. Break: 10:30 a.m. – 10:40 a.m.
- IV. Panel Two: Data Regarding Subminimum Wages and Competitive Integrated Employment: 10:40 a.m. – 11:20 a.m.
  - John Butterworth, Director of Employment Systems Change and Evaluation Senior Research Fellow, Institute for Community Inclusion, University of Massachusetts Boston
  - Teresa Grossi, Director, Strategic Developments, Indiana Institute on Disability and Community, Indiana University
- V. Break: 11:20 a.m. – 11:30 a.m.
- VI. Panel Three: The Nature of Existing 14(c) Programs: 11:30 a.m. – 12:40 p.m.
  - Michele Ford, President and CEO, Inroads to Opportunities
  - John Anton, Legislative Specialist, Massachusetts Down Syndrome Congress
  - Ruby Moore, Executive Director, Georgia Advocacy Office
  - Finn Gardiner, Research Associate, The Lurie Institute for Disability Policy, Brandeis University

- VII. Remarks by Gov. Tom Ridge, Chairman, National Organization on Disability: 12:45 p.m. – 1:00 p.m.
- VIII. Lunch: 1:00 p.m. – 2:00 p.m.
- IX. Panel Four: Transitioning from 14(c) Programs: 2:00 p.m. – 3:10 p.m.
- Jennifer Mathis, Director of Policy & Legal Advocacy and Deputy Legal Director, Bazelon Center for Mental Health Law
  - Julie Christensen, Director of Policy & Advocacy, Association of People Supporting Employment First (APSE)
  - Lilia Teninty, Office of Developmental Disabilities Services Director, State of Oregon Department of Human Services
  - Carol Ann DeSantis, President and CEO, Melwood
  - Bryan Dague, Think College Vermont Program Coordinator and Research Assistant Professor, College of Education and Social Services, University of Vermont
- X. Break: 3:10 p.m. – 3:20 p.m.
- XI. Panel Five: Reform to the 14(c) Program at the Federal Level: 3:20 p.m. – 4:30 p.m.
- U.S. Representative Glenn Grothman, Member, House Committee on Education and Labor
  - Kate McSweeney, Vice President of Government Affairs & General Counsel, ACCSES – The Voice of Disability Service Providers
  - Anil Lewis, Executive Director, Blindness Initiatives, National Federation of the Blind
  - Brian Collins, Senior Manager for Planning, Change Management, and Accessibility, Microsoft
  - Regina Kline, Partner, Brown, Goldstein, Levy
- XII. Break: 4:30 p.m. – 5:30 p.m.
- XIII. Open Public Comment Session: 5:30 p.m. – 6:30 p.m.

## CHAPTER 1: APPLICABLE LAW & POLICY CONSIDERATIONS

This chapter begins by discussing the legislative history of Section 14(c) of the Fair Labor Standards Act, the requirements the Act imposes on 14(c) employers, and how employers must calculate the subminimum wages of people with disabilities. The chapter then moves to examine developments in civil rights protections for people with disabilities. Finally, this chapter discusses alternatives and proposed reforms to the 14(c) program, including bills currently introduced in the U.S. Congress that would provide alternate funding to encourage the transition away from subminimum wage employment or would implement a gradual phase-out of the program altogether.

### 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.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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."<sup>68</sup> While some evidence suggests that it was originally conceived

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<sup>65</sup> 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](http://www.jstor.org/stable/41840777).

<sup>66</sup> 29 U.S.C. § 214(c).

<sup>67</sup> 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).

<sup>68</sup> 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>.

after World War I as a program to employ veterans with physical disabilities,<sup>69</sup> the 14(c) program is now mainly used to employ people (including non-veterans) with intellectual and developmental disabilities.<sup>70</sup>

The statutory language of the Fair Labor Standards Act sets the federal minimum wage.<sup>71</sup> 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 is impaired by a physical or mental disability (the disability may be a lifelong individual characteristic).<sup>72</sup> 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.”<sup>73</sup> Also, any worker earning a subminimum wage is entitled to overtime pay consistent with the provisions of the Fair Labor Standards Act.<sup>74</sup> 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.<sup>75</sup>

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.”<sup>76</sup> 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.<sup>77</sup> Notably, 14(c) regulations provide that “the determination of an employment relationship does not

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<sup>69</sup> 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>.

<sup>70</sup> Butterworth Testimony, *Subminimum Wages Briefing*, p. 90.

<sup>71</sup> 29 U.S.C. § 206(a)(1).

<sup>72</sup> 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).

<sup>73</sup> 29 U.S.C. § 214(c)(1).

<sup>74</sup> 29 U.S.C. § 207; 29 C.F.R. § 525.12(e).

<sup>75</sup> 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/FLSAAI2016\\_2.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FLSAAI2016_2.pdf). *See infra*, Notes 1045-1048 (discussion of state initiatives to abolish 14(c)).

<sup>76</sup> 29 U.S.C. § 214(c)(1); 29 C.F.R. § 525.3(d).

<sup>77</sup> 29 U.S.C. § 214(c)(1); *See*, 29 C.F.R. §§ 525.11525.13, 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).



depend upon the level of performance or whether the work is of some therapeutic benefit.”<sup>78</sup> There are also a number of employer requirements about wage determination, discussed below.<sup>79</sup>

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.<sup>80</sup> 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.”<sup>81</sup> Its duties and performance are evaluated in Chapter 3 of this report.

### *Employer Requirements*

Under Section 14(c), employers are permitted to pay a “special minimum wage”<sup>82</sup> 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.<sup>83</sup> The certificate covers all workers employed by the employer “provided such workers are in fact disabled for the work they are to perform.”<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup> The wage must be commensurate with wages paid to workers without disabilities,<sup>87</sup> although the wage is calculated based on the individual productivity of the worker with a disability.<sup>88</sup> The federal regulations explain this calculation as follows:

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<sup>78</sup> 29 C.F.R. § 525.3(g).

<sup>79</sup> See *infra* notes 82-93; 29 C.F.R. § 525.3(g).

<sup>80</sup> 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>.

<sup>81</sup> Zeigler Testimony, *Subminimum Wages Briefing*, pp. 26-27.

<sup>82</sup> 29 C.F.R. § 525.3(h).

<sup>83</sup> 29 C.F.R. §§ 525.7, 525.11.

<sup>84</sup> 29 C.F.R. § 525.12(b).

<sup>85</sup> 29 C.F.R. §§ 525.9(a)(3), 525.12(h)(1).

<sup>86</sup> 29 U.S.C. § 214(c)(2).

<sup>87</sup> 29 U.S.C. § 214(c)(1)(B); 29 C.F.R. § 525.3(i).

<sup>88</sup> 29 U.S.C. § 214(c)(1)(C); 29 C.F.R. § 525.12(c).

For example, the commensurate wage of a worker with a disability who is 75% 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% 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.<sup>89</sup>

The employer must evaluate and determine the worker's productivity within one month of the worker beginning employment.<sup>90</sup> 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.”<sup>91</sup> 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.<sup>92</sup> These 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.<sup>93</sup>

#### *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.<sup>94</sup> 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.<sup>95</sup> 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

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<sup>89</sup> 29 C.F.R. § 525.3(i).

<sup>90</sup> 29 C.F.R. § 525.12(j)(2).

<sup>91</sup> 29 C.F.R. § 525.12(j)(3).

<sup>92</sup> 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.”)

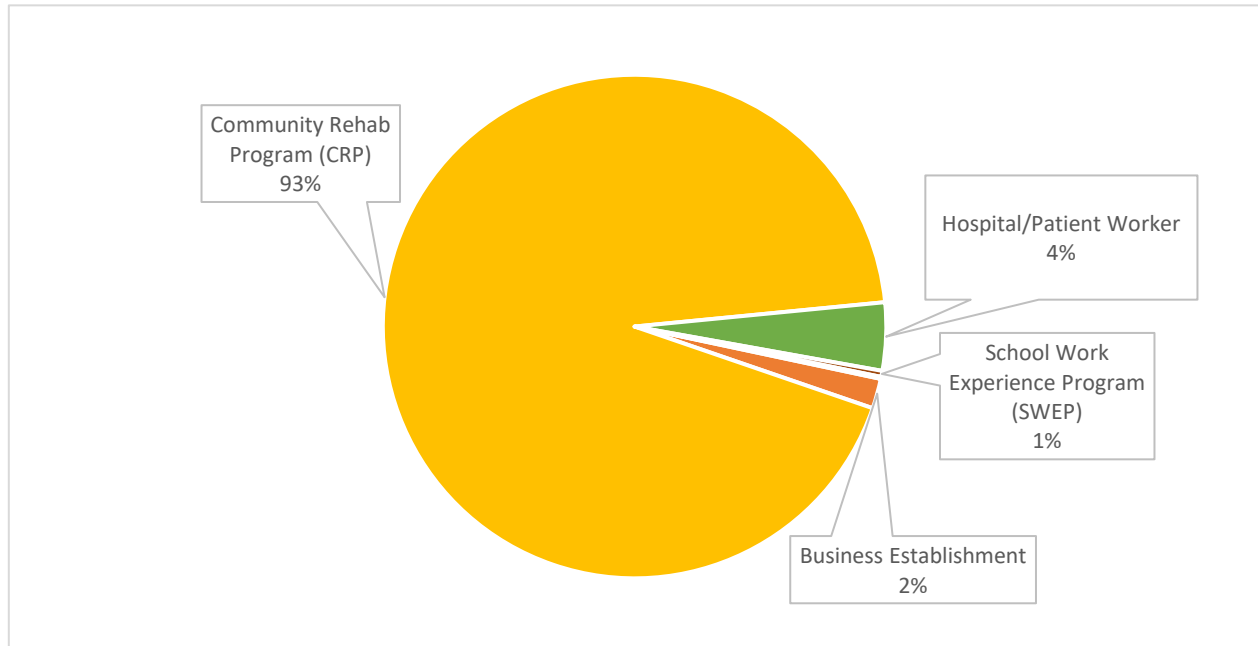
<sup>93</sup> *See infra*, note 280 (discussing the Workforce Innovation and Opportunity Act).

<sup>94</sup> Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at 28 (Sept. 15, 2016).

<sup>95</sup> *See infra* note 599.

subminimum wage workers employed, found a disproportionately large number of workers are employed by a small number of Community Rehabilitation Programs.<sup>96</sup>

**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.<sup>97</sup> 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.<sup>98</sup> Through a funding formula, federal grants are provided to the states through the Rehabilitation Services Administration of the Department of Education,<sup>99</sup> which in order to be received must be matched by the states.<sup>100</sup> In FY 2019, the federal government authorized \$3,521,990,000 in grant funding for vocational rehabilitation programs, which are responsible for

<sup>96</sup> National Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, (Oct. 2018) p. 50.

<sup>97</sup> 29 U.S.C. § 705(4).

<sup>98</sup> Congressional Research Service, *Rehabilitation Act: Vocational Rehabilitation State Grants*, 2014, p.1.

<sup>99</sup> *Ibid*, p.3.

<sup>100</sup> *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.<sup>101</sup>

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.<sup>102</sup> These programs may specifically require skills training and job coaching.<sup>103</sup>

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.”<sup>104</sup> To fully fund the services they offer, Community Rehabilitation Programs rely on a “braided funding stream”<sup>105</sup> 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.<sup>106</sup> All three federal programs impose restrictions that reflect a national disability policy that prioritizes competitive integrated employment.<sup>107</sup>

Many employers of persons with disabilities use these various funding mechanisms to provide services in addition to employing individuals with disabilities, as part of their overall employment

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<sup>101</sup> 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>.

<sup>102</sup> 29 U.S.C. § 723(b)(2).

<sup>103</sup> See *infra* notes 272-317 (discussing the Rehabilitation Act and the Workforce Opportunity Investment Act).

<sup>104</sup> National Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, (Oct. 2018) pp. 55-56.

<sup>105</sup> National Council on Disability, *Subminimum Wage and Supported Employment*, (Aug. 2012) p. 26.

<sup>106</sup> See discussion *infra* notes 778-799.

<sup>107</sup> See discussion *infra* notes 231-235.

programs. This includes 14(c) certificate holders such as MVLE in Virginia, as described in Chapter 4.<sup>108</sup> As discussed during the Commission Subcommittee’s site visit to MVLE, a Community Rehabilitation Program may describe utilization of 14(c) as a “stepping stone”<sup>109</sup> method of providing training to people with disabilities who might not be familiar with a particular employment setting.<sup>110</sup> Joanne Aceto, Senior Director of Employment Services at MVLE, indicated that MVLE sees employees transition from 14(c) to commensurate wages when they no longer need a regular job coach.<sup>111</sup> At the Commission’s briefing, Kate McSweeney, Vice President of Government Affairs and General Counsel of ACCSES, testified to the major role that Community Rehabilitation Programs may have in future policy, stating that “there can be no growth without them.”<sup>112</sup>

Kenan Aden of MVLE explained how MVLE, like other Community Rehabilitation Programs, relies on revenue generated by contracts they make with local businesses as well as state and federal funding. Such a contract with a local business “operates just like any other laborer contract.”<sup>113</sup> Where Rehabilitation Act funding and Medicaid funding are available to Community Rehabilitation Programs in their capacity as service providers, business contracts fund Community Rehabilitation Programs in their capacity as employers. As Mr. Aden explained:

It's very important for us to make sure that we separate out, first off, the job coaching, and the support services, and the funding that we're discussing. So when we talk about someone having access to one of the jobs that MVLE offers, every single time a staff person helps a person get into a job, that touch, that help is a support service.<sup>114</sup>

Aden went on to explain how the funding streams for these support services (and staff necessary to render them) are separate from the contract payments to pay 14(c) subminimum wages. Mr. Aden states, “We really have to ... separate out the contract performance and the pay for performing on the contract from the support service and ... the funding around providing the support service.”<sup>115</sup> While the support services Community Rehabilitation Programs provide to

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<sup>108</sup> See *infra* notes 830-837 (discussing the Virginia site visit in Chapter 4).

<sup>109</sup> Ashley Welsh, Program Manager of Transition and Training at MVLE, testimony, *Commission Subcommittee Virginia Roundtable, Springfield, VA*, Mar. 3, 2020, testimony, p. 11 (hereinafter cited as *Subminimum Wages Virginia Roundtable*).

<sup>110</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 3, 2020), Notes of Maureen Rudolph, General Counsel (Mar. 3, 2020).

<sup>111</sup> Joanne Aceto, Senior Director of Employment Services at MVLE, testimony, *Subminimum Wages Virginia Roundtable*, p.18.

<sup>112</sup> McSweeney Statement, at 4-5.

<sup>113</sup> Aden testimony, *Subminimum Wages Virginia Roundtable*, p. 55.

<sup>114</sup> *Ibid*, pp. 55-56.

<sup>115</sup> MVLE Transcript at 57.

their employees with disabilities to facilitate contract work are paid for by state and federal funding sources, the sub-minimum wages paid to 14(c) employees come directly from the labor contracts the provider is able to secure.<sup>116</sup>

Researchers found in 2016 that two-thirds of Community Rehabilitation Programs provided non-work services in addition to employment services.<sup>117</sup> 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.<sup>118</sup> 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.<sup>119</sup>

The type of work performed at a Community Rehabilitation Program varies widely. It may include packing, collating, and light assembly in a factory setting,<sup>120</sup> to working at a cotton candy shop.<sup>121</sup> Kitchen and cafeteria work may include rolling silverware in napkins, moving equipment around on carts, washing dishes, and filling table containers with sugar packets.<sup>122</sup> Community Rehabilitation Programs may even provide a service to translate any military skills to new employment.<sup>123</sup> 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

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<sup>116</sup> See MVLE Transcript at 59.

<sup>117</sup> 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 127-131.

<sup>118</sup> 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%, since 2010).

<sup>119</sup> Ibid.

<sup>120</sup> General Assembly Cincinnati, *Production*, <http://generalassemblycincy.com/production/> (last accessed May 26, 2020).

<sup>121</sup> Holy Angels, *Cotton Candy Factory*, <https://www.holyangelsnc.org/cotton-candy-factory> (last accessed May 26, 2020).

<sup>122</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (March 3, 2020); Notes of Maureen Rudolph, General Counsel (March 3, 2020).

<sup>123</sup> PRIDE Industries, *Military Jobs at PRIDE*, <https://prideindustries.org/jobs/military-jobs/> (last accessed May 26, 2020).

Community Rehabilitation Programs persons with a disability in her state are “wasting away and losing valuable time.”<sup>124</sup>

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 for people with disabilities.<sup>125</sup> 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;<sup>126</sup> there is also an additional focus on community life engagement.<sup>127</sup> Non-work services can range from rehabilitation services, day treatment, and training.<sup>128</sup> 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.<sup>129</sup> Additional on-site projects can include rug weaving, paper recycling, and custodial/food service training opportunities,<sup>130</sup> training in financial management, networking, and using various forms of transportation.<sup>131</sup> 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.<sup>132</sup> Community Rehabilitation Programs may also provide transportation, an important component for people with disabilities, particularly when accessible public transportation limits employment opportunities,<sup>133</sup> and for individuals who are unsure that another job would provide the transportation they require to work.<sup>134</sup> These funded services should

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<sup>124</sup> Donna Ahola, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>125</sup> See *infra*, notes 1075-1087 (discussing how a former Community Rehabilitation Program continues to provide services to people with disabilities).

<sup>126</sup> Even in facility-based settings, the ADA integration mandate requires integration whenever reasonable. See *infra* notes 200-203 (discussing the *Olmstead* Supreme Court case and subsequent Department of Justice actions); see also *infra* notes 142-156 (discussing the history of policies institutionalizing persons with disabilities).

<sup>127</sup> 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.

<sup>128</sup> 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>.

<sup>129</sup> MVLE, *Support Services*, <https://www.mvle.org/support-services/> (last accessed May 26, 2020).

<sup>130</sup> Booneville Human Development Center, *Overview*, <https://humanservices.arkansas.gov/about-dhs/ddds/human-development-centers/booneville-hdc> (last accessed May 26, 2020).

<sup>131</sup> Abilities Without Boundaries, *Programs & Services*, <https://abilitieswithoutboundaries.org/programs-services/> (last accessed May 26, 2020).

<sup>132</sup> See *infra*, notes 1075-1087.

<sup>133</sup> See *infra* notes 972, 1180, 1217, 1235, and, 1237.

<sup>134</sup> See *infra* note 972.

be taken into account when analyzing the economics as well as the effectiveness of 14(c) and other policy options.

### *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.<sup>135</sup> 14(c) certificate holders may conduct time studies or time trials as a method to determine the productivity of an individual with a disability.<sup>136</sup> However, these time studies may only be used to assist in setting that individual's wage.<sup>137</sup>

After the initial evaluation, the wage determination must be periodically reviewed.<sup>138</sup> 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.<sup>139</sup>

Employers may also establish a piece rate for industrial work being performed by workers with disabilities under a 14(c) certificate.<sup>140</sup> 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.).<sup>141</sup>

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<sup>135</sup> 29 U.S.C. § 214(c)(2); 29 C.F.R. § 525.12(j)(3).

<sup>136</sup> 29 C.F.R. § 525.12(h)(2)(i).

<sup>137</sup> 29 C.F.R. § 525.12(h)(2)(i).

<sup>138</sup> *Supra* note 92.

<sup>139</sup> 29 C.F.R. § 525.12(j)(3); Wage and Hour Division Response to USCCR Interrogatory No. 17 at 7.

<sup>140</sup> 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").

<sup>141</sup> 29 C.F.R. § 525.12(h)(1)(i).



## 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.<sup>142</sup> A 1983 Commission report documented the civil rights challenges facing people with disabilities dating back to pre-Revolutionary America, when “[l]aws in the Thirteen Colonies excluded settlers who could not demonstrate an ability to support themselves independently.”<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup> 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.<sup>146</sup>

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.<sup>147</sup> 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

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<sup>142</sup> See, e.g., U.S. Com’n on Civil Rights, *Are Rights a Reality?*, pp. 7-10.

<sup>143</sup> 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>.

<sup>144</sup> *Ibid.*, 19-20.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*, 21-22.

<sup>147</sup> *Ibid.*, 46.

housing, are covered by laws prohibiting other types of discrimination, but not by laws prohibiting handicap discrimination.<sup>148</sup>

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.<sup>149</sup> It 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.<sup>150</sup> 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.”<sup>151</sup> 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.<sup>152</sup>

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,

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<sup>148</sup> 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).

<sup>149</sup> 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>.

<sup>150</sup> *Larkin v. State of Michigan Dep’t of Social Services*, 89 F.3d 285 (6<sup>th</sup> Cir. 1996)

<sup>151</sup> *Id.* at 290 (analyzing *International Union, United Auto. Aerospace & Agricultural Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 197-200 (1991)).

<sup>152</sup> U.S. Representative Robert C. Scott Testimony, *Subminimum Wages Briefing*, p. 21.

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.”<sup>153</sup> 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.<sup>154</sup> 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.<sup>155</sup> 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.<sup>156</sup>

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.<sup>157</sup> “First established as a small advisory Council within the Department of Education in 1978, [the National Council on Disability] was transformed into an independent agency in 1984 and charged with reviewing all federal disability programs and policies.”<sup>158</sup> 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.”<sup>159</sup> 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*.<sup>160</sup> 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

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<sup>153</sup> 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).

<sup>154</sup> *Ibid.*, 31.

<sup>155</sup> *Ibid.*, 33.

<sup>156</sup> *Ibid.*, 34-35.

<sup>157</sup> 29 U.S.C. § 780(a).

<sup>158</sup> Nat’l Council on Disability, About Us, History of NCD, <https://ncd.gov/about> (accessed April 3, 2020).

<sup>159</sup> 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”).

<sup>160</sup> 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%20Deal%20to%20Real%20Deal%20FINAL\\_508.PDF](https://ncd.gov/sites/default/files/New%20Deal%20to%20Real%20Deal%20FINAL_508.PDF).

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.<sup>161</sup>

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 laws.”<sup>162</sup> By paying individuals less than the minimum wage, employers may be infringing upon the amendment’s express purpose of treating all people equally.<sup>163</sup> 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.<sup>164</sup> 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.<sup>165</sup> 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

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<sup>161</sup> *Ibid.*, 8-9 (emphasis in original).

<sup>162</sup> U.S. CONST. amend. XIV, § 1.

<sup>163</sup> 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>

<sup>164</sup> *See infra* notes 177-188.

<sup>165</sup> Alison Barkoff, Response to USCCR Follow-Up Question No. 6 at 8.

otherwise not have.<sup>166</sup> 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.”<sup>167</sup> It is also applicable to the federal government.<sup>168</sup> 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.”<sup>169</sup>

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 “rational basis” standard of review under the Equal Protection Clause.<sup>170</sup> 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.”<sup>171</sup> 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.”<sup>172</sup> Further, the Court stated that its decision was “absent controlling Congressional discretion.”<sup>173</sup>

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:

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<sup>166</sup> See *infra* notes 564-565.

<sup>167</sup> U.S. CONST. amend. XIV, § 1.

<sup>168</sup> See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>169</sup> 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](https://www.abajournal.com/news/article/14th_amendment_should_be_used_to_ensure_equal_protection_for_those_with_dis)

<sup>170</sup> *City of Cleburne v. Texas, Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

<sup>171</sup> *Id.* at 442.

<sup>172</sup> *Id.* at 442-43.

<sup>173</sup> *Id.* at 439-40.

[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[.]<sup>174</sup>

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.”<sup>175</sup> 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.<sup>176</sup>

#### *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, consistent, enforceable standards addressing discrimination against with disabilities;” and “to ensure that the Federal Government plays central role in enforcing the standards established[.]”<sup>177</sup> 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.<sup>178</sup>

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<sup>174</sup> 42 U.S.C. § 12101(a)(7).

<sup>175</sup> *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).

<sup>176</sup> 970 F. Supp. at 1132.

<sup>177</sup> 42 U.S.C. §12101(b)(1)-(3).

<sup>178</sup> 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>.

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.<sup>179</sup> 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.”<sup>180</sup> Moreover, such discrimination is prohibited in both the public and private sectors,<sup>181</sup> although there are some heightened requirements for public employers.<sup>182</sup>

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.<sup>183</sup> 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;”<sup>184</sup> failure to provide a reasonable accommodation unless it would impose an undue hardship on the business;<sup>185</sup> and discriminatory testing or qualification standards unless they are job-related for the position in question and consistent with business necessity.<sup>186</sup> Discrimination against a “qualified individual” is prohibited, and “qualified individual means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>187</sup> However, the statute requires consideration of “the employer’s judgement as to what functions of a job are essential.”<sup>188</sup>

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<sup>179</sup> 42 U.S.C. § 12102(3).

<sup>180</sup> 42 U.S.C. § 12102(1) (emphasis added).

<sup>181</sup> See 42 U.S.C. § 12111(2) (definition of “covered entity” means an employer, employment agency, labor organization, or joint labor-management committee”) and § 12111(5)(A) (definition of employer).

<sup>182</sup> 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).

<sup>183</sup> 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).

<sup>184</sup> 42 U.S.C. § 12112(b)(1).

<sup>185</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>186</sup> 42 U.S.C. § 12112(b)(6).

<sup>187</sup> 42 U.S.C. § 12111(8).

<sup>188</sup> *Id.*

Title II of the ADA establishes and protects the right of people with disabilities to receive services in the most integrated setting.<sup>189</sup> 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.<sup>190</sup>

### *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.<sup>191</sup> 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.<sup>192</sup> The language of Title II prohibiting exclusion or denial is referred to as ADA's "integration mandate."<sup>193</sup> 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."<sup>194</sup> Under this language, no specific amount of integration is required; however, integration is required to the fullest extent possible.<sup>195</sup>

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.<sup>196</sup> This language may apply to 14(c) workshops because although the rate of Community Rehabilitation Programs<sup>197</sup> offering integrated employment services has increased in recent years, over 90 percent of 14(c) employers are Community Rehabilitation Programs.<sup>198</sup>

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<sup>189</sup> 42 U.S.C. § 12132.

<sup>190</sup> *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).

<sup>191</sup> *See infra* notes 234-237.

<sup>192</sup> 42 U.S.C. § 12132.

<sup>193</sup> *See, e.g., Townsend v. Quasim*, 328 F.3d 511, 515-16 (9th Cir. 2003).

<sup>194</sup> 28 C.F.R. §35.130(d) (the "integration mandate") (emphasis added).

<sup>195</sup> *Id.*

<sup>196</sup> 28 C.F.R. §35.130(b)(1) and (b)(3).

<sup>197</sup> Community Rehabilitation Programs are federally-funded programs that provide vocational rehabilitation and employment services for people with disabilities.

<sup>198</sup> *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% of 14(c) certificates as of Jan. 2020)..



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.”<sup>199</sup>

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.<sup>200</sup> 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.<sup>201</sup> 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.<sup>202</sup>

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 segregated sheltered workshops with little opportunity to make meaningful and informed choices to work elsewhere.<sup>203</sup>

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<sup>199</sup> 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](https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf).

<sup>200</sup> *Olmstead v. L.C.*, 527 U.S. 581, 607 (1999).

<sup>201</sup> *Id.* at 604.

<sup>202</sup> *Id.* at 600-01.

<sup>203</sup> Regina Kline, Supplemental Testimony to USCCR at 2.

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.<sup>204</sup> Further, the complaint alleged the state education system was directing at-risk youth towards working in such segregated workshops.<sup>205</sup> The Department argued that although the plaintiffs didn’t allege risk of institutionalization, as in *Olmstead* “the precepts of *Olmstead* were nevertheless violated.”<sup>206</sup> 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.”<sup>207</sup>

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.<sup>208</sup> The state also agreed to enhance such opportunities through “Supported Employment” services funded by Medicaid.<sup>209</sup> 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.”<sup>210</sup> 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.<sup>211</sup> Further, at least in this case, employees who are phased out of sheltered workshops may be provided with supported employment through Medicaid.<sup>212</sup>

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<sup>204</sup> 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](https://www.ada.gov/olmstead/documents/lane_complaint.pdf).

<sup>205</sup> *Id.* at ¶ 9.

<sup>206</sup> 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).

<sup>207</sup> Brennan-Krohn, *supra* note 206, at 251; Lane, 841 F. Supp. 2d at 1203.

<sup>208</sup> Settlement Agreement, *Lane v. Brown*, No. 3:12-cv-00138 §§ IV – V (D. Ore. 2013), [https://www.ada.gov/olmstead/documents/lane\\_sa.pdf](https://www.ada.gov/olmstead/documents/lane_sa.pdf).

<sup>209</sup> *Id.*, § VII.1(b).

<sup>210</sup> *Id.*, § 12.

<sup>211</sup> 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](https://www.ada.gov/olmstead/documents/lane_fact_sheet.pdf).

<sup>212</sup> Settlement Agreement, *Lane v. Brown*, No. 3:12-cv-00138, § 12 (D. Ore. 2013), [https://www.ada.gov/olmstead/documents/lane\\_sa.pdf](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,<sup>213</sup> which culminated in a court-ordered consent decree in 2014.<sup>214</sup> 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.<sup>215</sup> 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.”<sup>216</sup> 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.<sup>217</sup> As discussed in Chapter 3, the 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.<sup>218</sup>

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.”<sup>219</sup>

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:

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<sup>213</sup> 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>.

<sup>214</sup> 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>.

<sup>215</sup> 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>.

<sup>216</sup> 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>.

<sup>217</sup> Consent Decree, *United States v. Rhode Island*, CA 14-174, § IV (D. R.I., Apr. 9, 2014), <https://www.ada.gov/olmstead/documents/ri-olmstead-statewide-agreement.pdf>.

<sup>218</sup> See *infra* note 749.

<sup>219</sup> Regina Kline, Supplemental Testimony to USCCR at 1.

This noncompetitive segregated environment was not designed for skills acquisition and did not present opportunities for upward mobility. In fact, the supervisors/managers, with 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.<sup>220</sup>

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.<sup>221</sup>

Lewis also testified how low expectations of people with disabilities can inhibit their ability to work in integrated settings and earn competitive wages.<sup>222</sup> Studies have shown that parental expectations and family engagement are important determinants in the success of transitions of

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<sup>220</sup> 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.

<sup>221</sup> *Ibid.*, 3.

<sup>222</sup> Lewis Testimony, *Subminimum Wages Briefing*, pp. 269-71.

people with disabilities to competitive integrated employment.<sup>223</sup> Brian Dague of the University 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.<sup>224</sup>

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.”<sup>225</sup> Census data also shows lower employment rates among this group, compared with people without intellectual and developmental disabilities.<sup>226</sup> 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.<sup>227</sup> 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.<sup>228</sup>

Some 14(c) workshops are sheltered or segregated, while others may be integrated and yet pay subminimum wages. As will be discussed in Chapter 3, data provided to the Commission 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.<sup>229</sup>

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<sup>223</sup> 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.

<sup>224</sup> Dague, Bryan, Sheltered employment, sheltered lives: Family Perspectives of conversion to community-based employment, *Journal of Vocational Rehabilitation* 37 (2012) at 2-4.

<sup>225</sup> Tracy Gritsenko, A-Team Missouri, Testimony, *Subminimum Wages Briefing*, p. 360.

<sup>226</sup> See *infra* notes 506-508.

<sup>227</sup> Mathis Testimony, *Subminimum Wages Briefing*, p. 190.

<sup>228</sup> *Ibid.*

<sup>229</sup> Wage and Hour Division Response to USCCR Interrogatory No. 2 at 2; Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (“It is important to note, investigation findings include a mix of some investigations with technical violations and some with more serious violations.”) (on file)

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. As discussed further in Chapter 3, 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. 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 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.”<sup>230</sup>

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.”<sup>231</sup>

Likewise, “competitive integrated employment” has a specific definition in the Rehabilitation Act for the purposes of vocational rehabilitation funding.<sup>232</sup> 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.”<sup>233</sup>

### *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

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<sup>230</sup> 29 U.S.C. § 705(5)(B)

<sup>231</sup> 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%20QA%20%282.19.15%20final%29.pdf>. (citing CMS and DOJ explanations of state obligations).

<sup>232</sup> 29 U.S.C. § 705(5)(B)

<sup>233</sup> ACICIEID Report at 9. The Committee also recommended federal agencies align policies and definitions to promote competitive integrated employment. ACICIEID Report at 11-12.

employees with disabilities.<sup>234</sup> Notably, these types of damages are not available against states, but they are available against private employers.<sup>235</sup> 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.<sup>236</sup> 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 Act as the employees with disabilities "were performing as productively and effectively as non-disabled workers."<sup>237</sup> In the EEOC's subsequent litigation under the ADA, EEOC was able to secure over a million dollars in back pay for the employees,<sup>238</sup> and a jury awarded the workers \$240 million for disability-based harassment, discrimination and abuse.<sup>239</sup> 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.<sup>240</sup>

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.<sup>241</sup> 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

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<sup>234</sup> *E.E.O.C. v. Hill Country Farms*, 899 F. Supp. 2d 827 (S.D. Iowa 2012), aff'd 564 Fed.Appx. 868 (Mem) (8<sup>th</sup> Cir. 2014).

<sup>235</sup> See *infra* note 762 (discussing *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 360 (2001)).

<sup>236</sup> *E.E.O.C. v. Hill Country Farms*, 899 F. Supp. 2d 827, 830-31 (S.D. Iowa 2012), aff'd 564 Fed.Appx. 868 (Mem) (8<sup>th</sup> Cir. 2014).

<sup>237</sup> *E.E.O.C. v. Hill Country Farms*, 899 F. Supp. 2d 827, 832 (S.D. Iowa 2012); see also *Solis v. Hill Country Farms*, 808 F.Supp.2d 1105 (S.D.Iowa 2011), aff'd, 469 Fed.Appx. 498 (8<sup>th</sup> Cir.2012).

<sup>238</sup> *E.E.O.C. v. Hill Country Farms*, 899 F. Supp. 2d 827, 831, 833-34 (S.D. Iowa 2012).

<sup>239</sup> *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>.

<sup>240</sup> 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).

<sup>241</sup> Anna Schechter, 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 Campbel, *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>.

with disabilities in a segregated “sampling division” to produce samples of flooring materials.<sup>242</sup> 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.”<sup>243</sup> Plaintiffs also alleged that employees with disabilities were paid according to the work assigned, that some were paid at a piece-rate,<sup>244</sup> and that “staff . . . have assigned Plaintiffs to the same mundane and rote tasks based on erroneous assumptions about their individual disabilities[.]”<sup>245</sup> Further, the complaint stated that:

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.<sup>246</sup>

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.<sup>247</sup> Defendants answered by denying the allegations,<sup>248</sup> and at the time of this writing, the litigation is still ongoing.<sup>249</sup>

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

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<sup>242</sup> Complaint at ¶ 2, *Steward, Magers, and Felton v. Roppe Corp., Seneca Re-ad Industries, Inc. and Seneca Cty. Bd. of Developmental Disabilities*, No. 3:18-cv-2905, ¶¶ 2 (type of business), (N.D. Ohio, Dec. 18, 2018), 17 (employing persons with disabilities) and 34 (segregated sampling division) (N.D. Ohio, Dec. 18, 2018), [https://www.disabilityrightsohio.org/assets/documents/seneca\\_ada\\_complaint\\_with\\_exhibits\\_dec2018.pdf](https://www.disabilityrightsohio.org/assets/documents/seneca_ada_complaint_with_exhibits_dec2018.pdf).

<sup>243</sup> *Id.* at ¶ 103 (emphasis added).

<sup>244</sup> *Id.* at ¶ 36.

<sup>245</sup> *Id.* at ¶ 38.

<sup>246</sup> *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](https://www.disabilityrightsohio.org/assets/documents/decision_and_order_from_the_alj_re_seneca-re-ad.pdf?pdf=seneca_decision).

<sup>247</sup> Complaint at ¶ 50, *Steward, Magers and Felton v. Roppe Corp., Seneca Re-ad Industries, Inc. and Seneca Cty. Bd. of Developmental Disabilities*, No. 3:18-cv-2905, ¶ 50 (N.D. Ohio, Dec. 18, 2018), [https://www.disabilityrightsohio.org/assets/documents/seneca\\_ada\\_complaint\\_with\\_exhibits\\_dec2018.pdf](https://www.disabilityrightsohio.org/assets/documents/seneca_ada_complaint_with_exhibits_dec2018.pdf)).

<sup>248</sup> 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).

<sup>249</sup> See PACER, Civil Docket for Case No. No. 3:18-cv-2905 (N.D. Ohio), (last accessed 1/24/20).



workshop refused to consider him for a promotion, claiming he was a ‘client’ and not an ‘employee.’”<sup>250</sup>

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.<sup>251</sup> 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.<sup>252</sup> 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 \$1.74. In 2013, it was just \$1.67 per hour.”<sup>253</sup> To date, *Denoewer* is pending before the federal district court in Ohio.<sup>254</sup>

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.<sup>255</sup>

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

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<sup>250</sup> 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>.

<sup>251</sup> *See*, Complaint, *Denoewer v. UCO Indus., Inc.*, 2:17-cv-00660 (S.D. Ohio 2017).

<sup>252</sup> *Id.*; *see also*, Regina Kline, Response to USCCR Follow-Up Questions at 5.

<sup>253</sup> *Id.*, at 5.

<sup>254</sup> Civil Docket, *Denoewer v. UCO Indus., Inc.*, 2:17-cv-00660 (S.D. Ohio 2017).

<sup>255</sup> John Anton Testimony, *Subminimum Wages Briefing*, p. 129.

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.<sup>256</sup>

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 dollar<sup>257</sup>

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.<sup>258</sup>

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% productivity. I have several answers to this question. Given what we now know and have available to us in 2019, I fundamentally question the

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<sup>256</sup> Derek Manners Testimony, *Subminimum Wages Briefing*, pp. 354-55.

<sup>257</sup> Gardiner Testimony, *Subminimum Wages Briefing*, p. 138.

<sup>258</sup> Grothman Testimony, *Subminimum Wages Briefing*, pp. 257-58.

notion that someone simply cannot work competitively. If someone is truly not performing at 100%, 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.<sup>259</sup>

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 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.<sup>260</sup>

Anil Lewis of the National Federation 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.<sup>261</sup>

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<sup>259</sup> Christensen Statement at 4.

<sup>260</sup> Moore Statement, at 2-3 (emphasis in original).

<sup>261</sup> Anil Lewis, Written Statement, p. 4.

*Developmental Disabilities Assistance and Bill of Rights Act of 2000*

Congress passed the Developmental Disabilities Assistance and Bill of Rights Act in 2000.<sup>262</sup> 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.<sup>263</sup>

The Act provides funding to establish state councils on developmental disabilities.<sup>264</sup> 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.<sup>265</sup> 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. . . .<sup>266</sup>

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 of individuals with developmental disabilities, or immediate relatives of adults with developmental disabilities.<sup>267</sup>

The Act also provides for the establishment of a national network of university centers for excellence in developmental disabilities education, research, and service.<sup>268</sup> 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.<sup>269</sup> A Commission Subcommittee visited one center for excellence, the University of Vermont's Center on Disability and Community Inclusion, during the Commission's

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<sup>262</sup> Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001 *et seq.*, Pub. L. 106-402, 114 Stat. 1677 (2000).

<sup>263</sup> 42 U.S.C. § 15009(a)(2).

<sup>264</sup> *See* 42 U.S.C. § 15021 *et seq.*

<sup>265</sup> *Id.*

<sup>266</sup> 42 U.S.C. § 15007.

<sup>267</sup> 42 U.S.C. § 15025(b)(3).

<sup>268</sup> 42 U.S.C. § 15061 *et seq.*

<sup>269</sup> 42 U.S.C. § 15063(a)(1).

site visit to Vermont in March 2020.<sup>270</sup> The Subcommittee's observations about this promising program are discussed in Chapter 4.<sup>271</sup>

### *Workforce Innovation and Opportunity Act of 2014*

Congress passed the Workforce Innovation and Opportunity Act in 2014.<sup>272</sup> 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.<sup>273</sup> 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.<sup>274</sup> 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.<sup>275</sup> 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.<sup>276</sup>

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.<sup>277</sup>

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

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<sup>270</sup> See *infra* notes 1088-1099.

<sup>271</sup> *Ibid.*

<sup>272</sup> Workforce Innovation and Opportunity Act, 29 U.S.C. § 795g, Pub. L. 113-128, 128 Stat. 1425 (2014).

<sup>273</sup> 29 U.S.C. §723 (as amended by the Workforce Innovation and Opportunity Act Pub. L. 113-128, 128 Stat. 1425 (2014)).

<sup>274</sup> Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at 28 (Sept. 15, 2016).

<sup>275</sup> 29 U.S.C. § 795g

<sup>276</sup> See *infra* note 296 (job training & career counseling requirements as applied in 14(c) programs) and note 297 (job training & career counseling applied in Vermont).

<sup>277</sup> 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>.

at least one of two conditions is met.<sup>278</sup> 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.<sup>279</sup> 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.<sup>280</sup>

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.<sup>281</sup> 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.<sup>282</sup> 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.<sup>283</sup> 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.<sup>284</sup> 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.<sup>285</sup>

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<sup>278</sup> 29 U.S.C. § 794g(a).

<sup>279</sup> 29 U.S.C. § 794g(a)(1) (the provisions of the Workforce Innovation and Opportunity Act went into effect on July 22, 2016).

<sup>280</sup> 29 U.S.C. § 794g(a)(2).

<sup>281</sup> 29 U.S.C. § 794g(c)(1).

<sup>282</sup> 29 U.S.C. § 794g(c)(1).

<sup>283</sup> 29 U.S.C. § 794g(c)(2).

<sup>284</sup> 29 U.S.C. § 794g(c).

<sup>285</sup> 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.<sup>286</sup> 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.<sup>287</sup> 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.<sup>288</sup> 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.<sup>289</sup>

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.<sup>290</sup> 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.<sup>291</sup>

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

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<sup>286</sup> 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](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2016_2.pdf).

<sup>287</sup> Barkoff Statement, at 7-8.

<sup>288</sup> Ibid., 8.

<sup>289</sup> Barkoff Testimony, *Subminimum Wages Briefing*, pp. 63-64.

<sup>290</sup> Ford Testimony, *Subminimum Wages Briefing*, pp. 145-147.

<sup>291</sup> Ibid., 147.

sessions.”<sup>292</sup> Butterworth described a disparity between states with regard to the effectiveness of 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.”<sup>293</sup> 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.”<sup>294</sup> Butterworth later added that there is a lack of sufficient or trustworthy data from schools regarding employment outcomes.<sup>295</sup>

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.<sup>296</sup> In Vermont, interviewees discussed more complex career counseling, but most job or skills training appeared to be received on-the-job in both states.<sup>297</sup>

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.<sup>298</sup> 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.<sup>299</sup> The legislative purpose of the Advisory Committee was to study the following:

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<sup>292</sup> Butterworth Testimony, *Subminimum Wages Briefing*, p. 105.

<sup>293</sup> *Ibid.*

<sup>294</sup> *Ibid.*, 107.

<sup>295</sup> *Ibid.*, 108-109.

<sup>296</sup> *See infra* notes 916-917, 946, and 950.

<sup>297</sup> *See infra* notes 1175-1176, 1188, 1198-1199, 1212, 1225, and 1246.

<sup>298</sup> 29 U.S.C. § 795n.

<sup>299</sup> 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](https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf).



- (1) Ways to increase the employment opportunities for individuals with intellectual or developmental disabilities or other individuals with significant disabilities in competitive integrated employment;
- (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.<sup>300</sup>

In its final report in September 2016,<sup>301</sup> 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.<sup>302</sup> The report found that in January of 2015, the estimated number of workers under all 14(c) certificates was 228,600.<sup>303</sup> Those employees with disabilities worked at 2,820 certificate holders, 89 percent of which were Community Rehabilitation Programs in 2015.<sup>304</sup> 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.<sup>305</sup> Overall, the Advisory Committee found that current 14(c) regulations and policies do not align with modern federal disability policy.<sup>306</sup>

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

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<sup>300</sup> 29 U.S.C. § 795n(f).

<sup>301</sup> 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.

<sup>302</sup> Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, pp. 29-31.

<sup>303</sup> Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, p. 28.

<sup>304</sup> *Ibid.*; See *supra*, note 12.

<sup>305</sup> Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, p. 28.

<sup>306</sup> *Ibid.*, p. 29.

disabilities receive from certificate holders.<sup>307</sup> Second, the Wage and Hour Division should engage in stronger oversight of certificate holders and use stricter standards for issuance and review of certificates.<sup>308</sup> Third, the federal government should assist states in building capacity to support transition to competitive integrated employment as an alternative to continuing sheltered employment.<sup>309</sup>

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.<sup>310</sup> 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.<sup>311</sup>

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.<sup>312</sup> 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.<sup>313</sup>

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

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<sup>307</sup> Ibid., p. 29.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

<sup>311</sup> Ibid., p. 30.

<sup>312</sup> 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).

<sup>313</sup> Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, p.30.

disabilities.<sup>314</sup> 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.<sup>315</sup> 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.<sup>316</sup> The Wage and Hour Division told the Commission that it reviews Section 511 compliance, including whether 14(c) employees are receiving required information about competitive integrated employment opportunities, in each investigation it conducts.<sup>317</sup>

### 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.”<sup>318</sup> 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,<sup>319</sup> and another would leave 14(c) in place, and also encourage integrated employment programs for persons with disabilities through tax credits and other incentives.<sup>320</sup> 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.<sup>321</sup> Elements of all of these models have been tried at the state level in recent years—and while discussion of specific states is reserved for Chapter 4, this section includes some analysis of how policy alternatives are playing out in the states.

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<sup>314</sup> Ibid.

<sup>315</sup> Ibid.

<sup>316</sup> Ibid., 29-30; *Infra*, Notes 717-719.

<sup>317</sup> See *supra*, Notes 281-289 (discussing requirements under Section 511 of the Rehabilitation Act to provide information about competitive integrated employment).

<sup>318</sup> Scott Statement, at 5.

<sup>319</sup> See *infra* notes 322-351.

<sup>320</sup> See *infra* notes 390-396.

<sup>321</sup> 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>.

*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.<sup>322</sup> Moreover, these types of programs would help alleviate the concern that people would lose their jobs if 14(c) were abruptly ended.<sup>323</sup> This type of policy parallels state policies that are in the process of or have transitioned from 14(c) to competitive integrated employment.<sup>324</sup>

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.<sup>325</sup> 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.<sup>326</sup> 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.<sup>327</sup>

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.<sup>328</sup>

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:

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<sup>322</sup> Christensen Testimony, *Subminimum Wages Briefing*, p. 239.

<sup>323</sup> See *infra* notes 557-558.

<sup>324</sup> See *infra* notes 1136-1146.

<sup>325</sup> 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).

<sup>326</sup> *Id.*

<sup>327</sup> 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).

<sup>328</sup> *Id.*

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.<sup>329</sup>

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 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.”<sup>330</sup>

U.S. Senator Maggie Hassan (D-NH) submitted a public comment to the Commission about the Transformation to Competitive Employment Act.<sup>331</sup> 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.<sup>332</sup> 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.”<sup>333</sup> 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.<sup>334</sup>

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.<sup>335</sup> States would have the ability to apply for grants from the federal government ranging from \$2,000,000 to

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<sup>329</sup> U.S. Representative Robert C. Scott Testimony, *Subminimum Wages Briefing*, p. 22.

<sup>330</sup> 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.

<sup>331</sup> U.S. Senator Margaret Wood Hassan, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>332</sup> *Ibid.*

<sup>333</sup> *Ibid.*

<sup>334</sup> *Ibid.*

<sup>335</sup> Transformation to Competitive Employment Act, S. 260/H.R. 873 § 101, 116th Cong. (2019).

\$10,000,000.<sup>336</sup> 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.<sup>337</sup> 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.<sup>338</sup> Each state receiving a grant would be required to create an advisory council consisting of various stakeholders to monitor and guide the transition,<sup>339</sup> and least 25 percent of the advisory council members would have to be people with disabilities.<sup>340</sup>

The Act would also assist current 14(c) employers in the transition to competitive integrated employment.<sup>341</sup> 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.<sup>342</sup> 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.<sup>343</sup> Grants to 14(c) certificate holders would be for a period of three years,<sup>344</sup> and for awards between \$100,000 and \$500,000,<sup>345</sup> in partnership with at least two entities with experience providing support with individuals with disabilities in competitive integrated employment.<sup>346</sup>

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

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<sup>336</sup> *Id.* at § 102(e).

<sup>337</sup> *Id.* at § 102.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* at § 102(a)(2)(E)(vii).

<sup>340</sup> *Id.* at § 102(a)(3)(A).

<sup>341</sup> *Id.* at § 103.

<sup>342</sup> *Id.* at § 103(b).

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at § 103(e).

<sup>345</sup> *Id.* at § 103(g).

<sup>346</sup> *Id.* at § 103(h)(2).

enacted by Congress.<sup>347</sup> Any previously issued, existing 14(c) certificates would be invalidated six years after the date of enactment.<sup>348</sup>

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.<sup>349</sup> 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,<sup>350</sup> including the number of employees with disabilities who have transitioned from subminimum wage employment to competitive integrated employment.<sup>351</sup> At the time of this writing, the bill awaits further consideration in the U.S. House of Representatives and U.S. Senate.<sup>352</sup>

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.”<sup>353</sup> 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

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<sup>347</sup> *Id.* at § 202.

<sup>348</sup> *Id.* at § 202.

<sup>349</sup> *Id.* at § 301.

<sup>350</sup> *Id.* at § 401(a)(1).

<sup>351</sup> *Id.* at § 402(1)-(4).

<sup>352</sup> 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).

<sup>353</sup> Finn Gardiner Testimony, *Subminimum Wage Briefing*, p. 137.

disabilities later in life, had fewer doubts about their competence as workers because they did not internalize stereotyping during childhood.<sup>354</sup>

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.

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.<sup>355</sup>

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.<sup>356</sup>

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

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<sup>354</sup> 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).

<sup>355</sup> John Anton Testimony, *Subminimum Wages Briefing*, pp. 127-128.

<sup>356</sup> 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).



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.<sup>357</sup>

At the Commission's briefing, Congressman Grothman (R-WI) testified that he represents 10 counties that have active 14(c) work centers.<sup>358</sup> Grothman testified that he has toured 11 sheltered workshops in Wisconsin, and that it is very important to tour them.<sup>359</sup> He opined that:

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.<sup>360</sup>

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.<sup>361</sup>

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

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<sup>357</sup> McSweeney Statement, at 4-5.

<sup>358</sup> Congressman Grothman Testimony, *Subminimum Wages Briefing*, p. 255.

<sup>359</sup> *Ibid.*

<sup>360</sup> *Ibid.*

<sup>361</sup> 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.

seek competitive employment as well as providing income and job satisfaction to individuals preferring to continue extended employment.<sup>362</sup>

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.<sup>363</sup> 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."<sup>364</sup> Hau testified that the financial and societal costs of ending the 14(c) certificate program will be too high, stating that:

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.<sup>365</sup>

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.<sup>366</sup>

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<sup>362</sup> U.S. Representative Vicky Hartzler, Written Statement for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights, Dec. 12, 2019.

<sup>363</sup> Hau Testimony, *Subminimum Wages Briefing*, p. 339.

<sup>364</sup> *Ibid.*

<sup>365</sup> *Ibid.*, p. 340.

<sup>366</sup> 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).

As several experts testified to the Commission, 14(c) repeal would not require the elimination of Community Rehabilitation Programs.<sup>367</sup> 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 (AbilityOne<sup>368</sup> and the Rehabilitation Act<sup>369</sup>), amounts to just over \$6 billion, while Medicaid Home and Community Based Services, which provides for services regardless of employment status, is annually funded at over \$90 billion.<sup>370</sup>

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.<sup>371</sup>

### *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, 2019<sup>372</sup> 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,<sup>373</sup> and the bill also contains provisions for the gradual phase out of subminimum wages

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<sup>367</sup> 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.

<sup>368</sup> U.S. AbilityOne Commission, *Fiscal Year 2017 Performance and Accountability Report*, p. 3, <https://abilityone.gov/commission/documents/U.S.%20AbilityOne%20Commission%20FY%202017%20PAR-Final.pdf>.

<sup>369</sup> See Department of Education, Rehabilitation Services, Fiscal Year 2020 Budget Request, <https://www2.ed.gov/about/overview/budget/budget20/justifications/i-rehab.pdf>.

<sup>370</sup> Steve Eiken, Kate Sredl, Brian Burwell, and Angie Amos, Medicaid Expenditures for Long-Term Services and Supports in FY 2016 (IBM Watson Health, 2018).

<sup>371</sup> Ridge Testimony, Briefing Transcript, p. 184.

<sup>372</sup> 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>.

<sup>373</sup> Raise the Wage Act, S. 105/H.R. 582 § 2, 116th Cong.

paid to people with disabilities by raising the minimum allowed wage paid under a 14(c) certificate over a period of six years.<sup>374</sup> 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.”<sup>375</sup>

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 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.<sup>376</sup>

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.<sup>377</sup> 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

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<sup>374</sup> Raise the Wage Act, S. 105/H.R. 582 § 6(a)(1), 116th Cong.

<sup>375</sup> U.S. Representative Robert C. Scott Testimony, *Subminimum Wages Briefing*, p. 14.

<sup>376</sup> U.S. Senator Patty Murray, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights (citations omitted).

<sup>377</sup> Raise the Wage Act, S. 105/H.R. 582 § 6(a)(2), 116th Cong.

entities with experience in competitive integrated employment.<sup>378</sup> However, the Raise the Wage Act does not provide grants or other financial assistance.<sup>379</sup>

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.<sup>380</sup> 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.

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.<sup>381</sup>

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.<sup>382</sup>

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:

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<sup>378</sup> *Id.* § 6(a)(2)(8).

<sup>379</sup> *See generally*, Raise the Wage Act, S. 105/H.R. 582 § 6, 116th Cong.

<sup>380</sup> 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).

<sup>381</sup> U.S. Representative Glenn Grothman Testimony, *Subminimum Wages Briefing*, p. 309.

<sup>382</sup> Ford Testimony, *Subminimum Wages Briefing*, pp. 125-126.

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.<sup>383</sup>

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.<sup>384</sup>

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."<sup>385</sup> Since 2013, Microsoft's Supported Employment Program has helped over 280 people with intellectual and developmental disabilities find jobs at Microsoft campuses worldwide.<sup>386</sup> 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."<sup>387</sup> 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."<sup>388</sup>

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

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<sup>383</sup> U.S. Representative James R. Langevin, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>384</sup> Brian Collins, briefing transcript at 274-75.

<sup>385</sup> Collins Testimony, *Subminimum Wages Briefing*, p. 272.

<sup>386</sup> *Ibid.*, 272-73.

<sup>387</sup> *Ibid.*, 274.

<sup>388</sup> *Ibid.*, p. 274.

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.<sup>389</sup>

### *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.<sup>390</sup> The Act provides an incentive for employers to hire people with disabilities who are referred from a vocational rehabilitation agency.<sup>391</sup> The hiring entities are offered a tax credit defraying some of the hiring entity's tax liability in exchange for the hiring of a person with a disability referred by a vocational rehabilitation agency.<sup>392</sup> This model is similar to other models, such as AbilityOne (discussed further in Chapter 3), which relies on the employee's Medicaid funding in order to provide supports needed to employ them at minimum wage.<sup>393</sup> 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.<sup>394</sup> 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

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<sup>389</sup> *Ibid.*, p. 276.

<sup>390</sup> 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).

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *See infra* notes 799-804.

<sup>394</sup> 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).

Missouri, except through 14(c) employers.<sup>395</sup> 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.<sup>396</sup>

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.<sup>397</sup> When DeSantis testified before the Commission in November 2019, the average wage for a worker with disabilities at Melwood was \$15.68 per hour.<sup>398</sup> Melwood’s employees are all entitled to employee benefits such as health insurance and retirement contributions.<sup>399</sup> 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.”<sup>400</sup> 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 lives.”<sup>401</sup> 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.”<sup>402</sup>

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.<sup>403</sup> Since then, Melwood has grown from a \$90 million organization to a \$110 million organization.<sup>404</sup> DeSantis explained how paying people with disabilities above the minimum wage has made a positive impact on Melwood’s business and the community:

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<sup>395</sup> 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.

<sup>396</sup> See *infra*, notes 972, 1180, 1217, 1235, and 1237.

<sup>397</sup> DeSantis Statement, at 4.

<sup>398</sup> Carol Ann DeSantis, Testimony, *Subminimum Wages Briefing*, p. 211.

<sup>399</sup> *Ibid.*

<sup>400</sup> DeSantis Statement, at 1.

<sup>401</sup> Carol Ann DeSantis, Testimony, *Subminimum Wages Briefing*, p. 209.

<sup>402</sup> *Ibid.*; see *supra* notes 135-141 (discussing legal requirements for time trials).

<sup>403</sup> Carol Ann DeSantis, Testimony, *Subminimum Wages Briefing*, p. 211.

<sup>404</sup> *Ibid.*



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.<sup>405</sup>

### *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.<sup>406</sup> 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.<sup>407</sup> The Department of Labor's 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."<sup>408</sup> 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.<sup>409</sup> Moreover, since 2017 the Office of Disability Employment Policy expanded policy assistance to service providers that hold

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<sup>405</sup> Ibid., 212.

<sup>406</sup> 42 U.S.C. § 12132; *see also supra* notes 192-195 (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).

<sup>407</sup> Office of Disability Employment Policy, *Employment First*, <https://www.dol.gov/odep/topics/EmploymentFirst.htm> (Last visited Apr. 1, 2020).

<sup>408</sup> Office of Disability Employment Policy, *Employment First*, <https://www.dol.gov/odep/topics/EmploymentFirst.htm> (Last visited Apr. 1, 2020) (emphasis in original).

<sup>409</sup> Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (on file).

Section 14(c) certificates to help them move toward competitive integrated employment, and more than 300 providers have participated nationally.<sup>410</sup> 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.<sup>411</sup> 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.<sup>412</sup> In addition, the Office of Disability Employment Policy has recently launched its National Expansion of Employment Opportunities Network initiative.<sup>413</sup> The effort aims to increase competitive integrated employment for people with disabilities by working directly with national provider organizations.<sup>414</sup> 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.<sup>415</sup> 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.<sup>416</sup>

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 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

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<sup>410</sup> Ibid.

<sup>411</sup> Ibid.

<sup>412</sup> Ibid.

<sup>413</sup> Ibid.

<sup>414</sup> Ibid.

<sup>415</sup> Ibid.

<sup>416</sup> Ibid.

would be reasonable for an employer to provide, for the purpose of removing additional barriers on the job in the mainstream market.<sup>417</sup>

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.”<sup>418</sup> 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.<sup>419</sup>

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.<sup>420</sup> Employment First begins with the presumption that all people can work in competitive integrated employment settings, regardless of ability.<sup>421</sup> As Jennifer Mathis explained in her testimony, “Employment First policies [recognize] that competitive integrated employment should be the default option for people with disabilities.”<sup>422</sup> 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 option with respect to the use of publicly-financed day and employment services for youth and adults with significant disabilities.<sup>423</sup>

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<sup>417</sup> 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).

<sup>418</sup> Alison Barkoff, Supplemental Testimony to USCCR at 3; 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d).

<sup>419</sup> 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 *infra*, notes 557-559 (discussing public comments highlighting choice).

<sup>420</sup> SELN, *Employment First Resource List* at 1 (April 2019)  
<http://static.smallworldlabs.com/umass/content/SELN%20Employment%20First%20resource%20list-spring-2019.pdf>

<sup>421</sup> Association of People Supporting Employment First, *APSE Fact Sheet: Employment First* at 1,  
<https://www.apse.org/wp-content/uploads/docs/Employment%20First%20-%20Legislator%20Fact%20Sheet.pdf>.

<sup>422</sup> Mathis Testimony, *Subminimum Wages Briefing* pp. 191-92.

<sup>423</sup> 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).

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.<sup>424</sup> 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.<sup>425</sup> Of those 38 states, 23 have passed legislation that formally made integrated employment outcomes the preferred state policy for people with disabilities.<sup>426</sup> 17 states plus DC have enacted Employment First policies by executive order or directive.<sup>427</sup> 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.<sup>428</sup>

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.

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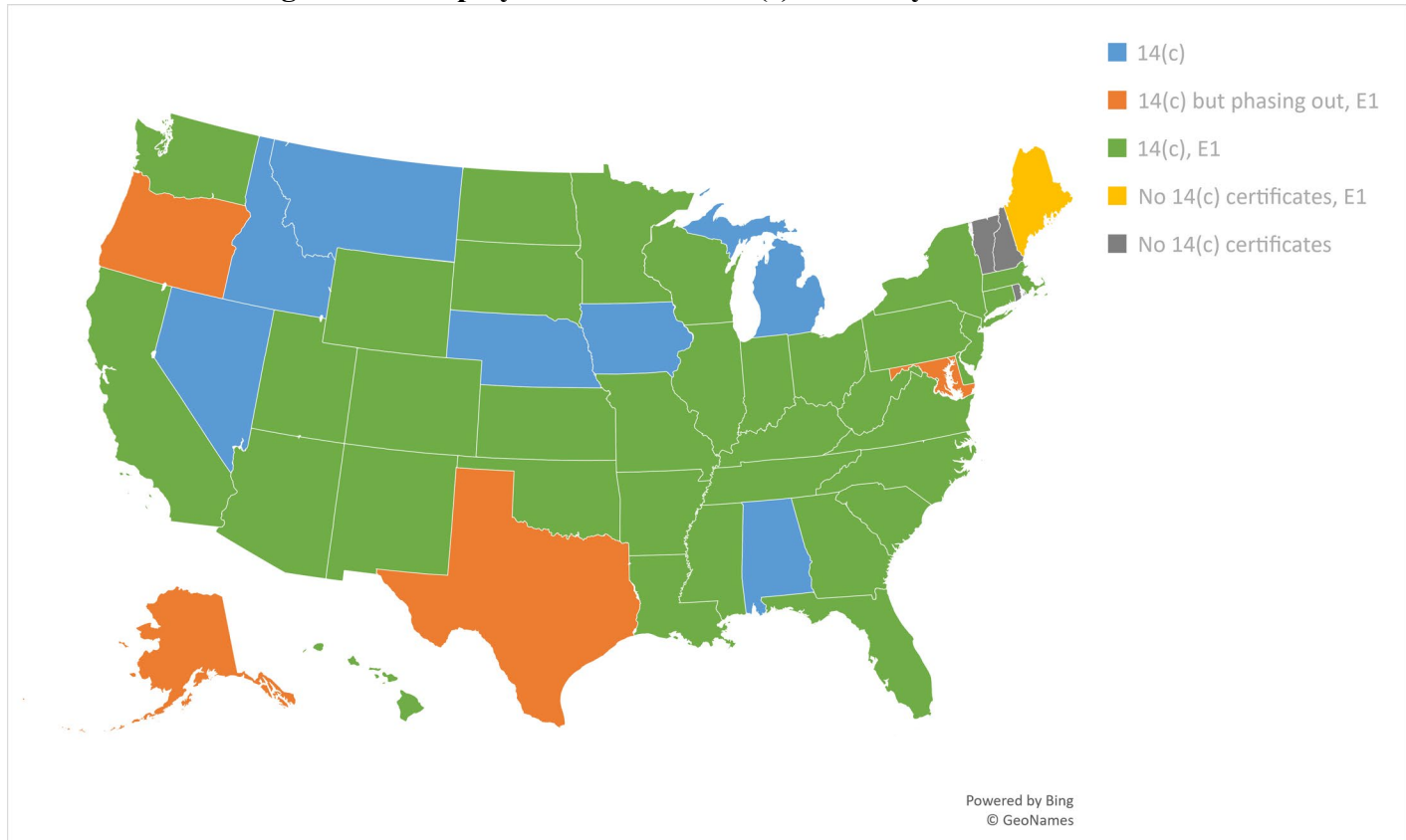
<sup>424</sup> See, e.g. Ariz. Exec. Order No. 2017-08, “The Establishment of Arizona as an Employment First State” (Nov. 15, 2017) [https://azgovernor.gov/sites/default/files/executive\\_order\\_2017-08\\_employment\\_first\\_state\\_0.pdf](https://azgovernor.gov/sites/default/files/executive_order_2017-08_employment_first_state_0.pdf). (“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”).

<sup>425</sup> Association of People Supporting Employment First, *Employment First Map*, Jan. 2020 <https://apse.org/employment-first-map/>.

<sup>426</sup> Ibid.

<sup>427</sup> Ibid.

<sup>428</sup> 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.<sup>429</sup> 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.<sup>430</sup>

<sup>429</sup> 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](https://askearn.org/wp-content/uploads/docs/nga_2013_better_bottom_line.pdf).

<sup>430</sup> *Ibid.*

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:

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.<sup>431</sup>

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.<sup>432</sup>

### *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

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<sup>431</sup> Michele Ford Testimony, *Subminimum Wages Briefing*, pp. 121-122.

<sup>432</sup> *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.<sup>433</sup>

At a briefing held by the Arizona State Advisory Committee to the Commission, two employers from community service agencies advocated for reexamining who is eligible to work under a 14(c) certificate, and imposing limits on use of 14(c) employment to ensure that it is a training program and not an end destination for employment.<sup>434</sup> One testified that she supported the elimination of sheltered employment settings, but not the elimination of Section 14(c), arguing that people working for subminimum wages experience limited progress and sheltered employment is ineffective in developing employment skills for people with disabilities.<sup>435</sup> However, she is not in favor of ending subminimum wages, and stated that they are needed because some of the individuals served who earn a special minimum wage would end up with no wages.<sup>436</sup>

The Commission also received many public comments in favor of maintaining Section 14(c), some of which included ideas on how protections could be better enforced. One commenter suggested that the federal government “could reduce the approvals for 14(c) employers over time and gain data as to where people go, how it affects their lives and how to respect choice.”<sup>437</sup> The implication is that future policy choices could be made from this type of precise data.

The Commission also received thousands of public comments urging that 14(c) should be retained, and the critical data received from these comments are included in the following chapter.<sup>438</sup>

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<sup>433</sup> See *infra* note 1013; *c.f. supra* notes 281-285; *but see infra*, notes 704-705 (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).

<sup>434</sup> Mark Jacoby, Testimony, *Arizona Briefing*, pp. 87-91.

<sup>435</sup> Jennifer Baier, Testimony, *Arizona Briefing*, p. 95; See *infra* notes, 997-998.

<sup>436</sup> Jennifer Baier, Testimony, *Arizona Briefing*, p. 95.

<sup>437</sup> Public Comment No. 796 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>438</sup> See *infra* notes 556-573.

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## CHAPTER 2: DATA AND ANALYSIS

This chapter summarizes and evaluates available quantitative and qualitative data relevant to understanding the civil rights implications of Section 14(c). It also summarizes and analyzes a new dataset, which is the thousands of public comments received by the Commission in the 30-day public comment period after the Commission briefing.

### 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.<sup>439</sup> A recent media report estimated that roughly 420,000 people with disabilities were earning subminimum wages.<sup>440</sup> 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.<sup>441</sup> 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.<sup>442</sup> 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.<sup>443</sup> 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.<sup>444</sup> 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

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<sup>439</sup> Zeigler Testimony, *Subminimum Wages Briefing*, pp. 68-69.

<sup>440</sup> 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/>.

<sup>441</sup> 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).

<sup>442</sup> See *infra* note 445, and accompanying text explaining the difference in methods.

<sup>443</sup> 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).

<sup>444</sup> Butterworth Testimony, *Subminimum Wage Briefing*, p. 95.

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 certificate-holder's main establishment, whereas 321,131 represents the estimated total of workers employed at all establishments associated with the certificate-holder.<sup>445</sup>

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.<sup>446</sup> 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"<sup>447</sup>) as of April 2019.<sup>448</sup> This means that an estimated 83.3 percent of persons working in 14(c) settings have intellectual or developmental disabilities.<sup>449</sup> Census data also show that very generally speaking, persons with intellectual or developmental disabilities may have the hardest time finding employment.<sup>450</sup> However further

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<sup>445</sup> 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).

<sup>446</sup> 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.").

<sup>447</sup> 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).").

<sup>448</sup> Butterworth Testimony, *Subminimum Wage Briefing*, p 95.

<sup>449</sup> 80% of 96 = 83.3%

<sup>450</sup> See *infra* note 472 (discussing Census data of employment statistics by type of disability).

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.<sup>451</sup>

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.<sup>452</sup> 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 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.<sup>453</sup> In fact, his data collection efforts rely on data provided by state agencies or independent surveys, rather than data from the federal government.<sup>454</sup> 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,<sup>455</sup> and the average number of hours worked was 16 hours per week.<sup>456</sup> This means that the average person with a disability working at a 14(c) certificate holding entity earned just \$53.44 per week, or \$213.76 per month.

As Mary Zeigler of the Wage and Hour Division described during her testimony, data published by the Wage and Hour Division, including the number of people with disabilities working for 14(c) certificate holders, is a “snapshot” in time and is not intended to be a comprehensive national census of all people with disabilities working for 14(c) certificate holders.<sup>457</sup> Instead, these data consist of what 14(c) certificate holders reported to the federal government on their applications when asked to state how many persons with disabilities they have employed during the most recent fiscal quarter, but the total number of employees over the course of a year is typically higher.<sup>458</sup> Wage and Hour reports the number of people with disabilities working for a 14(c) certificate holder based on what is stated in the application, however that number is not static and may change over time.<sup>459</sup> Wage and Hour Division characterized their data as a “snapshot” for several other reasons.

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<sup>451</sup> See *infra* notes 542-547 (discussing further data and testimony).

<sup>452</sup> Romano Testimony, *Subminimum Wages Briefing*, pp. 38-39; Butterworth Testimony, *Subminimum Wages Briefing*, pp. 98, 111.

<sup>453</sup> Butterworth Statement at 2.

<sup>454</sup> Butterworth Testimony, *Subminimum Wage Briefing*, pp. 94-95.

<sup>455</sup> Butterworth Statement at 3.

<sup>456</sup> *Ibid.*

<sup>457</sup> Zeigler Testimony, *Subminimum Wage Briefing*, p 69.

<sup>458</sup> Wage and Hour Division Response to USCCR Interrogatory No. 9 at 4-5.

<sup>459</sup> Applicants must only report the number of people with disabilities employed and earning a subminimum wage during the preceding fiscal quarter, see, Wage and Hour Division Response to USCCR Interrogatory No. 9 at 4.

First, 14(c) certificates expire 1-2 years after they are issued;<sup>460</sup> however 14(c) certificate holders are not required to provide updates to Wage and Hour between renewal applications.<sup>461</sup> Second, as each 14(c) certificate is issued following the date of application, they are issued at different times rather than on a certain date, making the total number of 14(c) employees a set of “snapshots” from different dates.<sup>462</sup> Moreover, Wage and Hour only updates the list of current and pending 14(c) certificates twice annually, in January and July, meaning that any data reported is staggered and not continuously updated.<sup>463</sup> Finally, entities with pending 14(c) certificate renewals are permitted to continue operations while their application is reviewed, however Wage and Hour does not report the number of people with disabilities working for that entity during the most recent fiscal quarter until an application has been approved.<sup>464</sup> For example, Wage and Hour provides data on their website about the 1,281 currently issued certificates and 277 pending certificates (13 initial applications and 264 renewal applications), but does not provide any information about the number of people employed at entities seeking a renewal of their certificate.<sup>465</sup> From this data, trends can be examined, but some workers with disabilities may be left out, and that is why in 2108, National Council on Disability estimated there were 321,131 14(c) employees when Wage and Hour Division’s snapshot of data only counted 130,951.<sup>466</sup>

There are other national studies that the Commission took into account. For example, despite data showing low labor force participation rates for people with disabilities, a national study by Massachusetts’ Institute for Community Inclusion found that 47 percent of unemployed people with disabilities want a job in the community.<sup>467</sup> During the same time period, the number of 14(c) certificate holders also declined from 1,772 in 2017 to 1,390 in 2019.<sup>468</sup> In addition, although it is a different type of data because it is based on highly voluntary participation, the Commission

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<sup>460</sup> Wage and Hour Division, Response to USCCR Interrogatory No. 9 at 4-5; Wage and Hour Division, Field Operations Handbook Chapter 64 § 64d01(a) (“Work Center and Patient Worker certificates are issued for 2-year periods. Business Establishment (Special Worker) certificates, including SE and SWEP certificates, are issued for a 1-year period.”); *See supra*, Note 457.

<sup>461</sup> Wage and Hour Division Response to USCCR Interrogatory No. 9 at 4-5.

<sup>462</sup> *Ibid.*

<sup>463</sup> *See infra* notes 598-600.

<sup>464</sup> 29 C.F.R. § 525.13(b) (“If an application for renewal has been properly and timely filed, an existing special minimum wage certificate shall remain in effect until the application for renewal has been granted or denied”).

<sup>465</sup> U.S. Dep’t of Labor Wage and Hour Division, 14(c) Certificate Holders, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders> (last accessed Apr. 7, 2020) (data is as of Jan. 1, 2020).

<sup>466</sup> *See supra* note 443.

<sup>467</sup> 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.

<sup>468</sup> 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).

appreciated the thousands of public comments received in the 30 days after the briefing and analyzes the resulting dataset herein. The Commission also took into account testimony received, and questions asked and answered during and after the briefing. Each of these datasets are discussed in turn below.

### 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.<sup>469</sup> Looking at this data over time shows that the number of persons who self-identify as persons with disabilities has been increasing.<sup>470</sup> 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.<sup>471</sup> 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% of the under 5 years old population had a disability.
- For those ages 5-17, the rate was 5.6%. For ages 18-64, the rate was 10.6%. For people ages 65 and older, 35.2% had a disability.
- In 2016, of the US population with disabilities, over half (51.0%) were people in the working ages of 18-64, while 41.4% were 65 and older.
- Disability in children and youth accounted for only 7.3% (ages 5-17) and 0.4% (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 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.

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<sup>469</sup> U.S. Census Bureau, American Community Survey (2018), Disability Characteristics, Table S1810, <https://data.census.gov/cedsci/table?q=S18&d=ACS%201-Year%20Estimates%20Subject%20Tables&tid=ACSST1Y2018.S1810&hidePreview=true&y=2018&moe=false>.

<sup>470</sup> 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](https://www2.census.gov/programs-surveys/acs/methodology/design_and_methodology/acs_design_methodology_report_2014.pdf).

<sup>471</sup> U.S. Census Bureau, American Community Survey (2010), Disability Characteristics, Table S1810, [https://data.census.gov/cedsci/table?tid=ACSST1Y2010.S1810&t=Disability&vintage=2018&hidePreview=true&cid=S1810\\_C01\\_001E](https://data.census.gov/cedsci/table?tid=ACSST1Y2010.S1810&t=Disability&vintage=2018&hidePreview=true&cid=S1810_C01_001E).

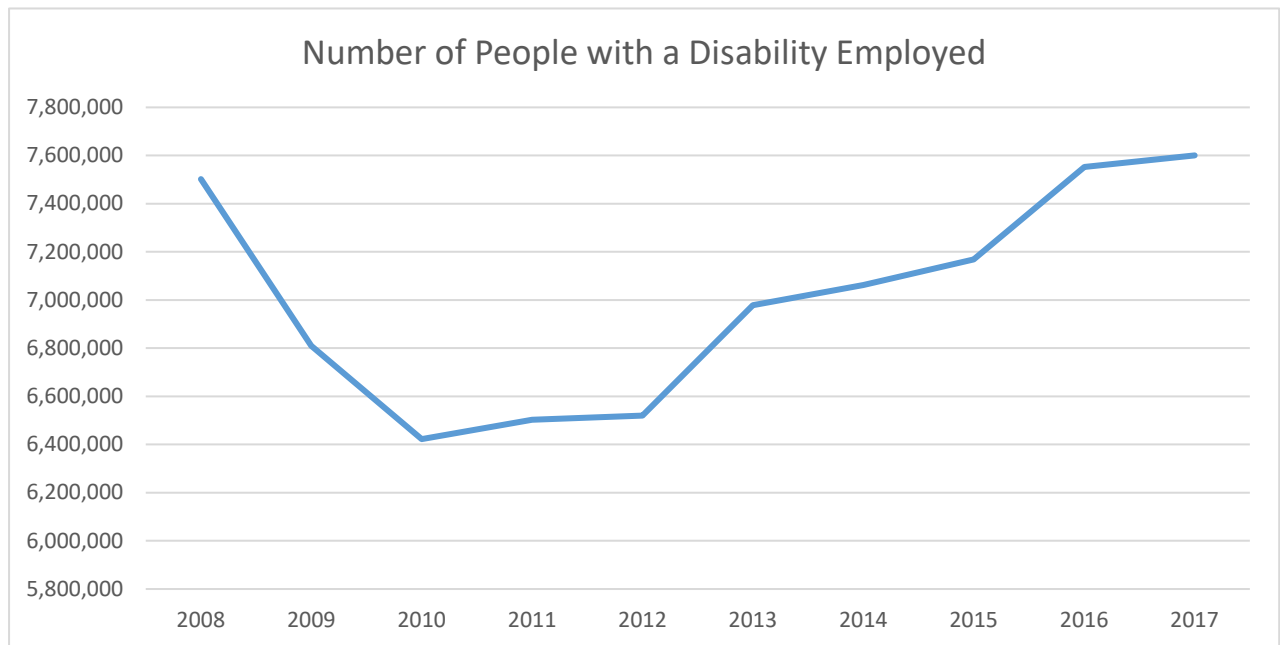
- In the US in 2016, 35.9% of people with disabilities ages 18-64 living in the community were employed. The employment percentage was more than double for people without disabilities, 76.6%.
- The employment gap, difference between the employment percentage for people with disabilities (35.9%) and people without disabilities (76.6%), was 40.7 percentage points.<sup>472</sup>

There was a slight but statistically insignificant decrease in the percentage of persons with disabilities between the 2017 and 2018 American Community Survey.<sup>473</sup>

### *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.<sup>474</sup>

**Chart 2.1**



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

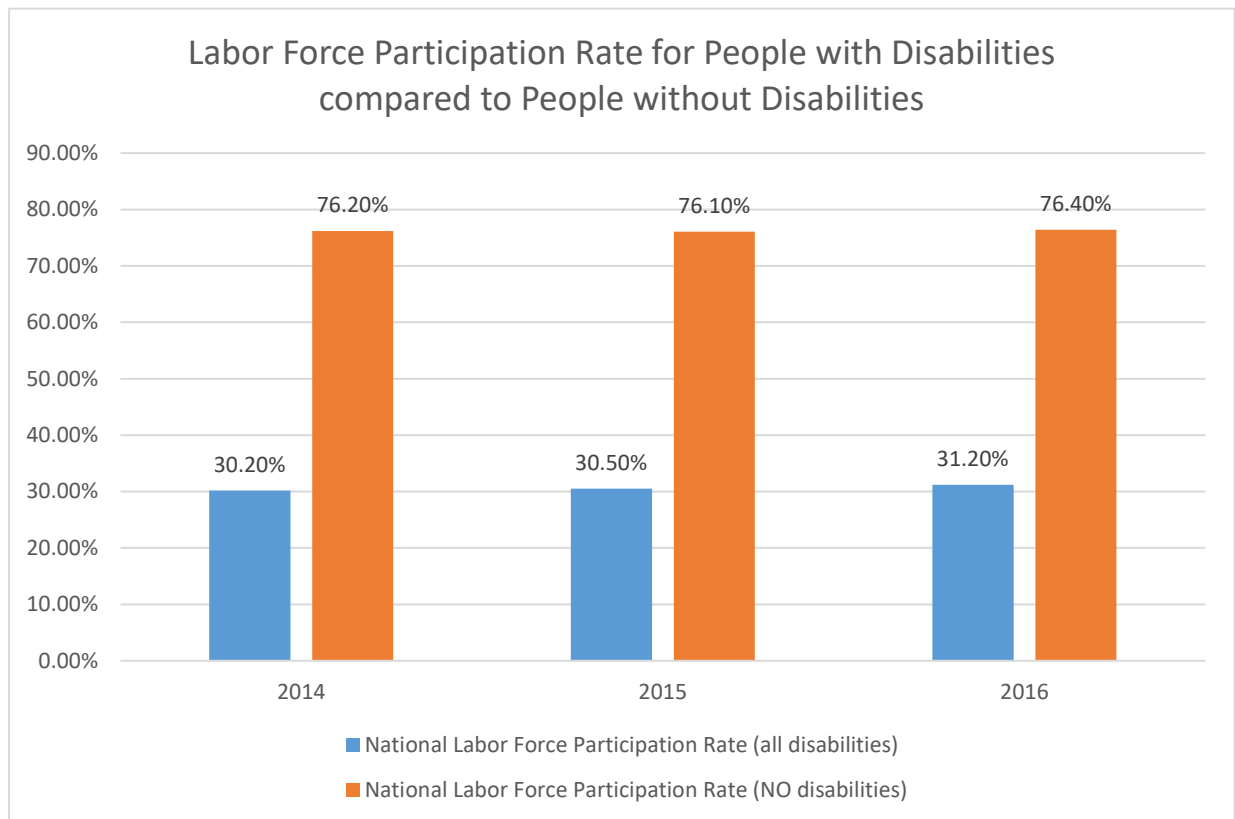
<sup>472</sup> University of New Hampshire, Institute on Disability, 2017 Disability Statistics Annual Report, p. 2, [https://disabilitycompendium.org/sites/default/files/user-uploads/2017\\_AnnualReport\\_2017\\_FINAL.pdf](https://disabilitycompendium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf).

<sup>473</sup> Ibid., 3-4.

<sup>474</sup> 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>.

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.<sup>475</sup>

**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.<sup>476</sup> The survey also found that the percentage of non-white people with disabilities

<sup>475</sup> 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](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 474 (discussing 2008 market decline and subsequent recovery).

<sup>476</sup> 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.

has been increasing since 2007.<sup>477</sup> 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.<sup>478</sup> Fifty-six percent were male, and 44 percent were female.<sup>479</sup>

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, “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.”<sup>480</sup> 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.<sup>481</sup>

#### *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.<sup>482</sup>

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<sup>477</sup> 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).

<sup>478</sup> 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.

<sup>479</sup> Ibid.

<sup>480</sup> 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.

<sup>481</sup> Ibid. at 163.

<sup>482</sup> 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.<sup>483</sup>

**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

<sup>483</sup> 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.<sup>484</sup> 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.<sup>485</sup>

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.<sup>486</sup> Some studies have attempted to gather an understanding of national trends based on data compiled by state agencies.<sup>487</sup> However, data collected from states is incomplete, as not all states report metrics about people with disabilities in a consistent manner, if at all.<sup>488</sup>

#### *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.<sup>489</sup> 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

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<sup>484</sup> 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.

<sup>485</sup> Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at 17, 100 (Sept. 15, 2016).

<sup>486</sup> Wage and Hour Division Response to USCCR Interrogatory Nos. 16-17 at 7.

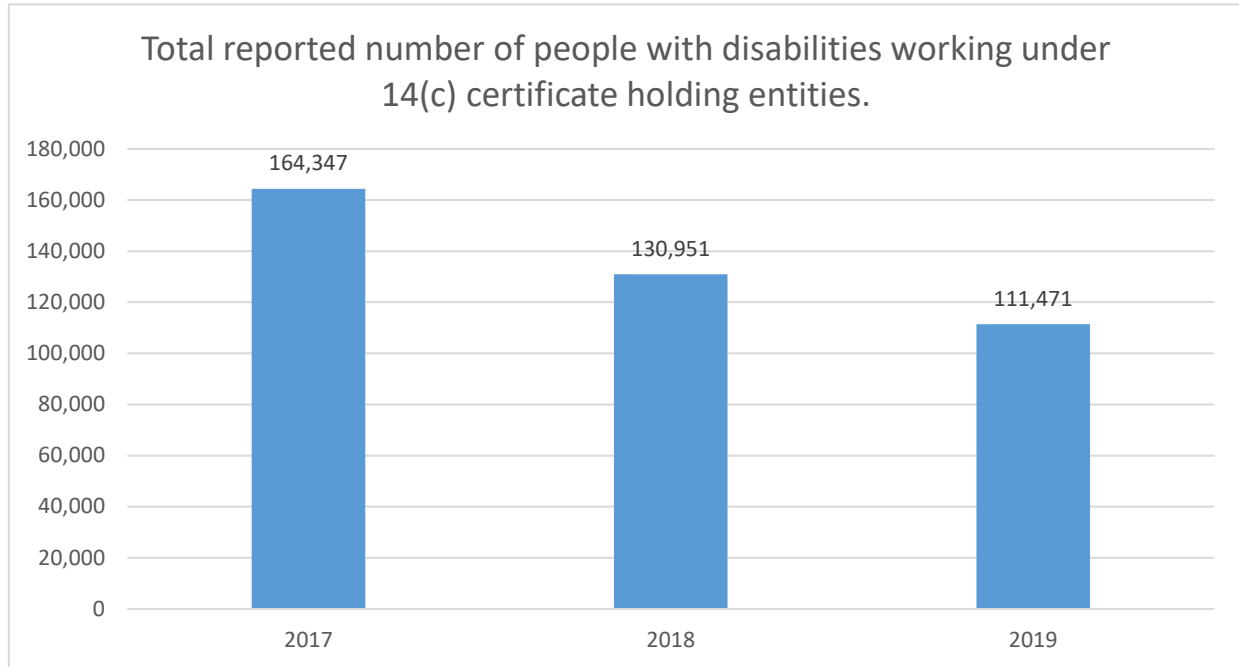
<sup>487</sup> See e.g. Winsor, J., Timmons, J., Butterworth, J., Migliore, A., Domin, D., Zalewska, A., & Shepard, J. (2018). *StateData: The national report on employment services and outcomes through 2016*. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion.

<sup>488</sup> Butterworth Testimony, *Subminimum Wages Briefing*, p. 112; See, Butterworth Response to USCCR Follow-Up Question No. 2 at 1-2.

<sup>489</sup> 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](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>)

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.<sup>490</sup>

**Chart 2.3**



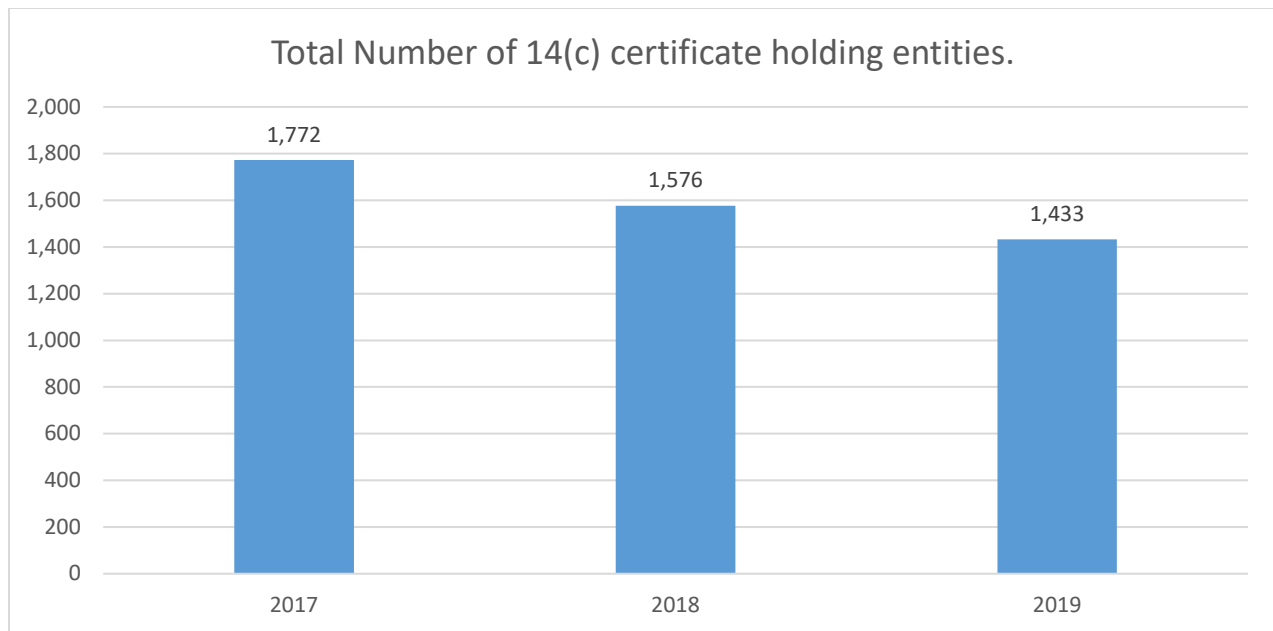
Source: The LEAD Center, Data and Resources to Inspire a Vision of Employment

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.<sup>491</sup>

<sup>490</sup> 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.

<sup>491</sup> 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.<sup>492</sup> As discussed, this limited information is ,<sup>493</sup> 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.<sup>494</sup>

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.<sup>495</sup> 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

<sup>492</sup> Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (on file).

<sup>493</sup> Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (on file).

<sup>494</sup> Wage and Hour Division Response to USCCR Interrogatory No. 19 at 8; *See supra*, notes 458-465 (describing the limited data WHD collects from 14(c) certificate applications).

<sup>495</sup> Wage and Hour Division Response to USCCR Interrogatory No. 19 at 8; *See infra*, notes 458-462 (describing the limited data Wage and Hour Division collects from 14(c) certificate applications).

collection and analysis, or how the Wage and Hour Division can use this electronically collected data to inform its administration of the 14(c) program.<sup>496</sup> Also, unfortunately, despite the expectation that it might provide additional data,<sup>497</sup> the data collected on the new online application is the same as the limited data from the old paper application.<sup>498</sup>

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.<sup>499</sup>

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

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<sup>496</sup> Zeigler Testimony, *Subminimum Wages Briefing*, pp. 51-52; Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (on file).

<sup>497</sup> 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](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.

<sup>498</sup> Wage and Hour Division, Response to Affected Agency Review (May 19, 2020) (on file).

<sup>499</sup> 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 \(May 19, 2020\) \(on file\)](#).

provided under the Workforce Innovation and Opportunity Act.<sup>500</sup> 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 employment outcomes are for people with disabilities who transition to competitive employment.<sup>501</sup> 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.<sup>502</sup> 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.<sup>503</sup>

### *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.<sup>504</sup> This reporting increase may be because the total population of persons with disabilities has also increased in recent years.<sup>505</sup> 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.<sup>506</sup> As discussed, because of federal

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<sup>500</sup> 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).

<sup>501</sup> 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).

<sup>502</sup> 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](https://ncd.gov/sites/default/files/Documents/NCD_Deal_Report_508.pdf).

<sup>503</sup> 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).

<sup>504</sup> UMass Boston, Institute for Community Inclusion, Statedata.info. *State IDD Agencies. U.S. Total: Integrated employment, number.*

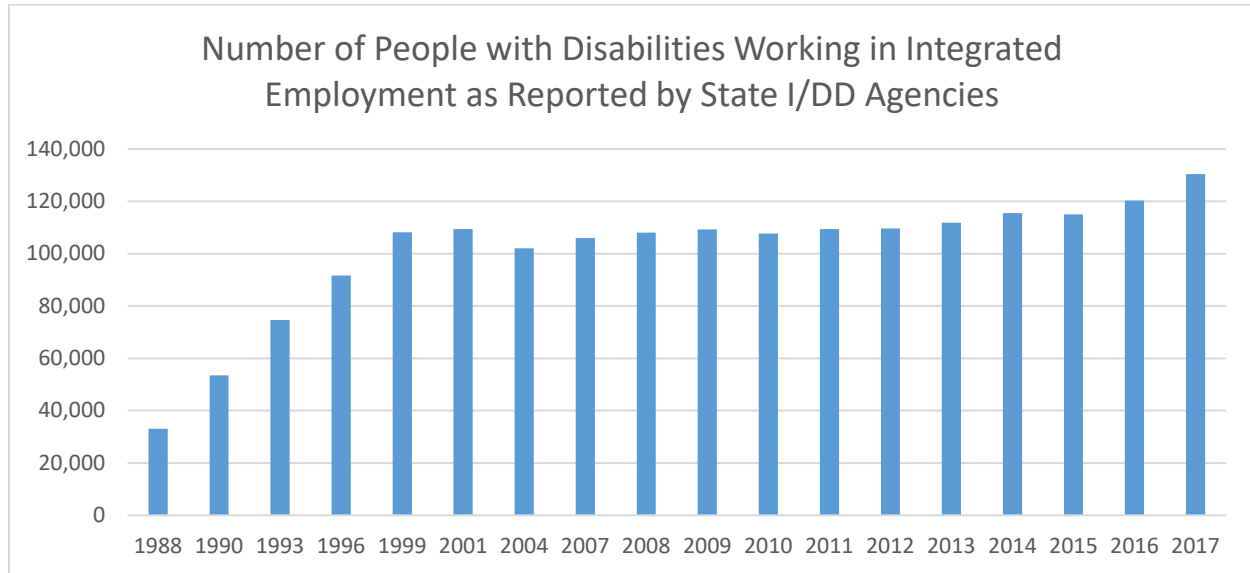
<http://www.statedata.info/data/showchart/686484> (last accessed Feb. 1, 2020).

<sup>505</sup> See *supra* notes 469-472.

<sup>506</sup> 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 *infra* notes 512-513.

funding structures for Community Rehabilitation Programs, there is relatively more data about persons in this category.<sup>507</sup>

**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% 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.<sup>508</sup>

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

<sup>507</sup> See *supra* note 101.

<sup>508</sup> *Ibid.*, 2.

employed<sup>509</sup> compared to only 35.5 percent of working age people with disabilities.<sup>510</sup> Employment rates can vary depending on type of disability.<sup>511</sup> 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.<sup>512</sup> 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.<sup>513</sup>

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.<sup>514</sup> 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.<sup>515</sup>

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

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<sup>509</sup> 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>.

<sup>510</sup> U.S. Census Bureau, American Community Survey, Employment Status by Disability and Type (2016) <https://data.census.gov/cedsci/table?q=B18120%3A%20EMPLOYMENT%20STATUS%20BY%20DISABILITY%20STATUS%20AND%20TYPE&hidePreview=true&tid=ACSDT1Y2016.B18120>.

<sup>511</sup> See *infra* notes 512-518.

<sup>512</sup> 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](https://disabilitycompendium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf).

<sup>513</sup> *Ibid.*

<sup>514</sup> Grossi Statement, *Subminimum Wages Briefing* at 3.

<sup>515</sup> *Ibid.*, 3-4.



developmental disabilities who did not have a job indicated they wanted a competitive job.<sup>516</sup> 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.<sup>517</sup> Butterworth also noted in his testimony 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.”<sup>518</sup>

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.<sup>519</sup>

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.<sup>520</sup> 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.<sup>521</sup> In 2002-2003, eighteen percent (18%) of individuals receiving services from a Community Rehabilitation Program received services in an integrated setting.<sup>522</sup> 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.<sup>523</sup> However, as Butterworth cautioned in his

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<sup>516</sup> 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](https://www.nationalcoreindicators.org/upload/core-indicators/NCI_AtAGlanceReport_1718_Final_May2019.pdf).

<sup>517</sup> 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).

<sup>518</sup> Butterworth Testimony, *Subminimum Wages Briefing*, p. 97.

<sup>519</sup> Anil Lewis Testimony, *Subminimum Wages Briefing*, p. 294.

<sup>520</sup> See *infra* note 599.

<sup>521</sup> 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.

<sup>522</sup> Ibid.

<sup>523</sup> Ibid.

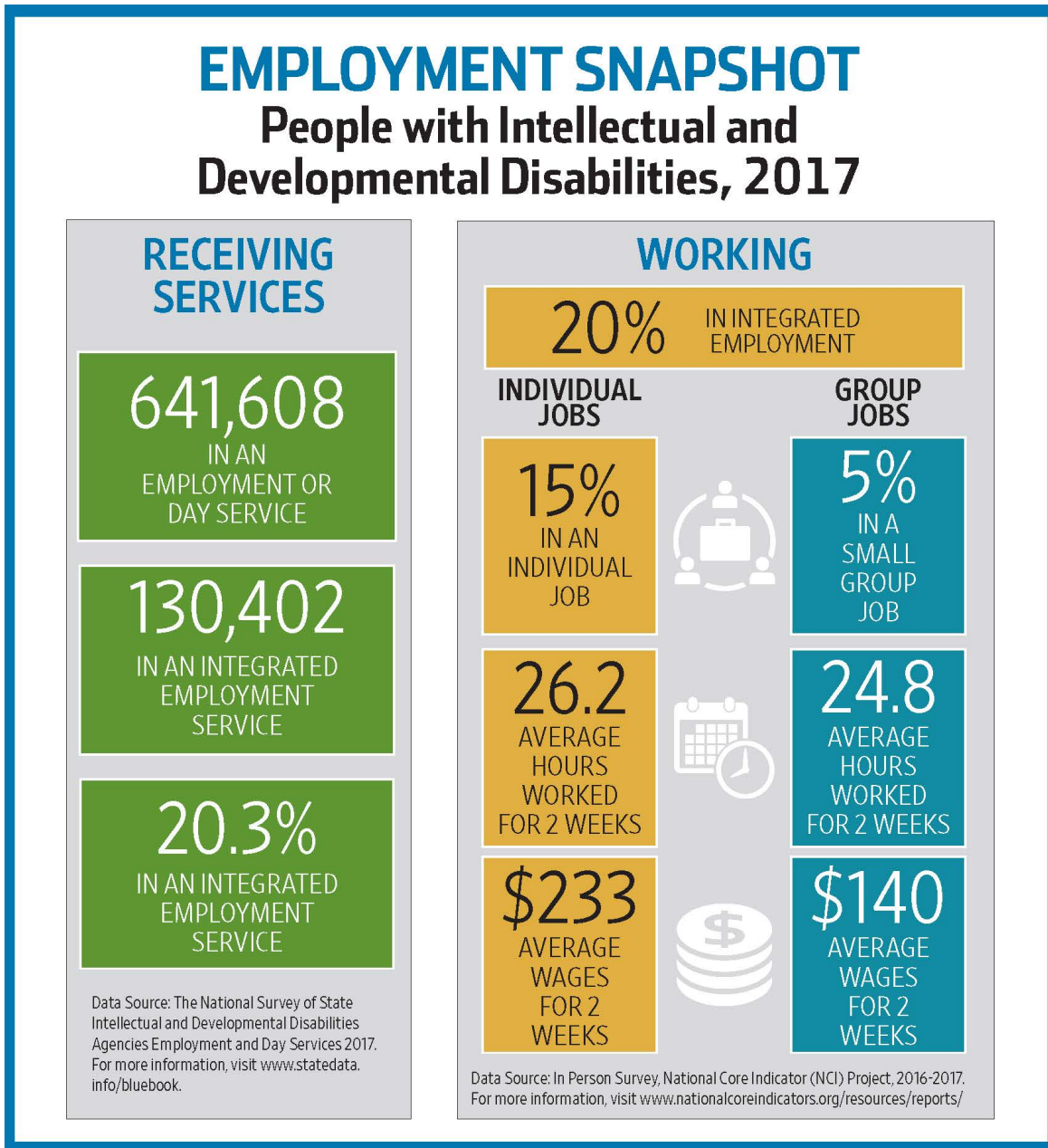
testimony to the Commission, services defined as integrated may include small group employment that still pays a subminimum wage to people with disabilities.<sup>524</sup>

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.

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<sup>524</sup> 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**

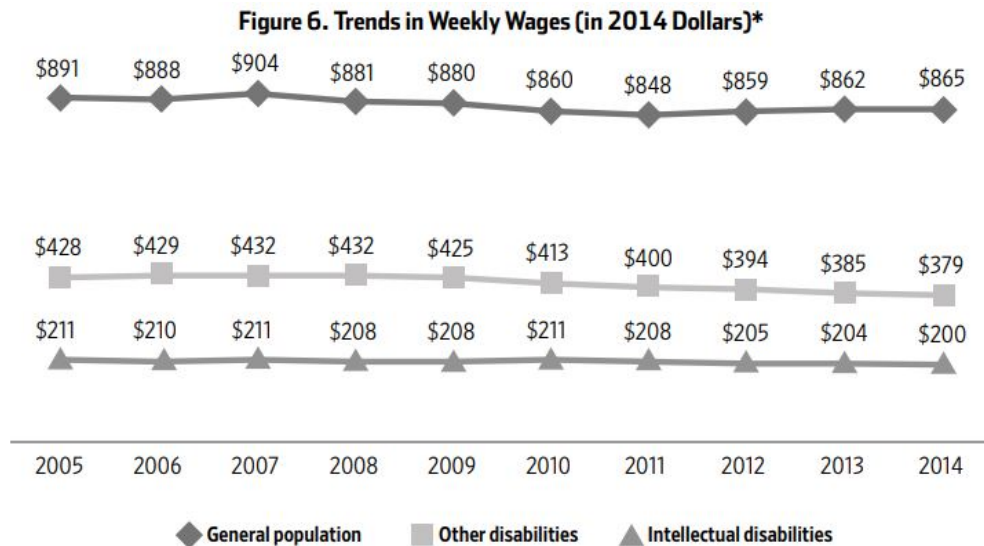


**ThinkWork!**

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).<sup>525</sup>

**Figure 2.2**

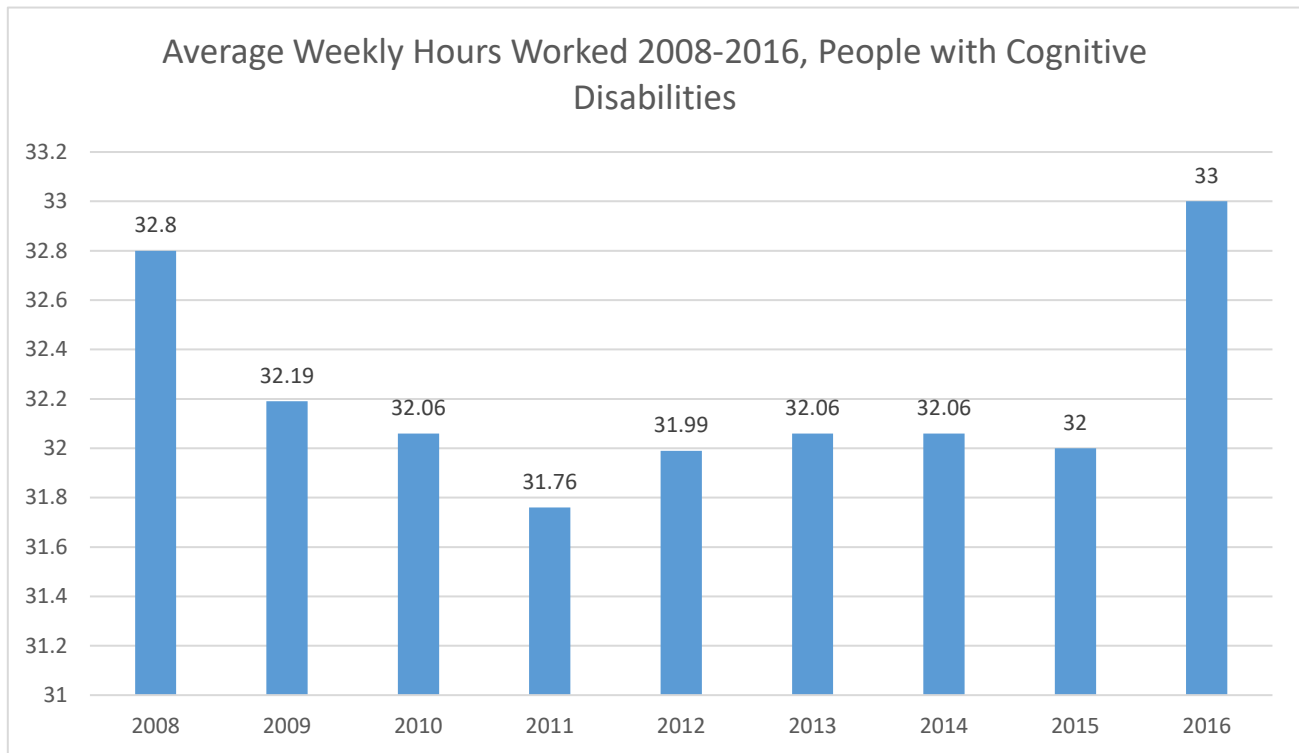


\* Earnings of the general population were computed by dividing the annual wages of civilians, ages 16–64, by 52 weeks, using data from the American Community Survey.

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.

<sup>525</sup> 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>

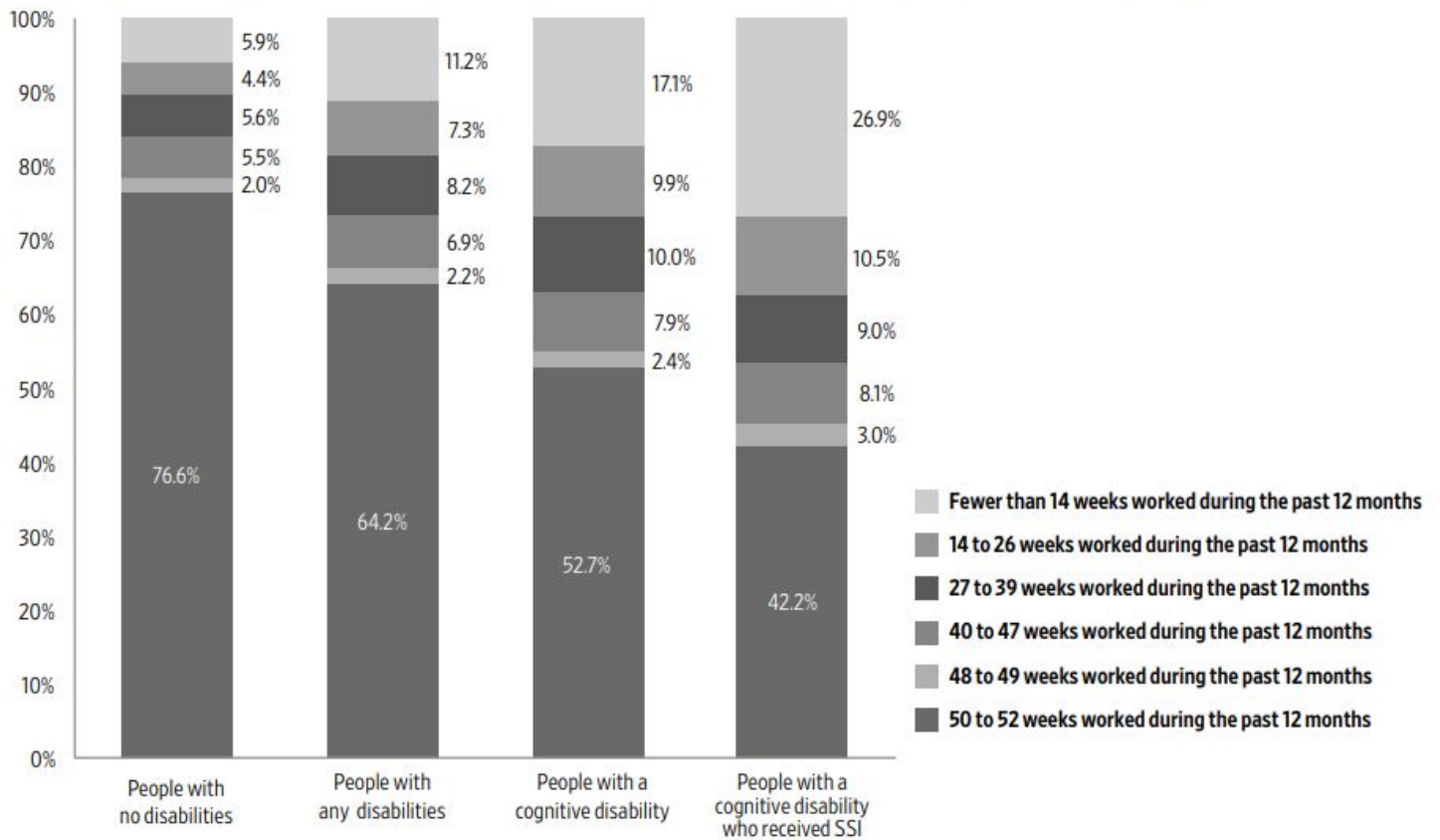
Data from the 2016 American Community Survey conducted by the Census Bureau and analyzed by the Institute for Community Inclusion found that people with cognitive disabilities worked fewer weeks during a 12-month period on average than people without disabilities.<sup>526</sup> People with cognitive disabilities also worked fewer weeks on average than people with other types of disabilities, and as compared with people in the workforce without disabilities.<sup>527</sup>

<sup>526</sup> 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.

<sup>527</sup> 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.<sup>528</sup> 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.<sup>529</sup>

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

<sup>528</sup> Ibid., 5.

<sup>529</sup> Butterworth and Grossi Testimony, *Subminimum Wages Briefing*, pp. 114-115.

integrated employment since the 1979 study.<sup>530</sup> Furthermore, there is no national data available 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.<sup>531</sup> 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.<sup>532</sup>

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.<sup>533</sup>

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.<sup>534</sup>

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.<sup>535</sup> For example:

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<sup>530</sup> Ibid., 108.

<sup>531</sup> Ibid., 112.

<sup>532</sup> Butterworth Statement, at 5.

<sup>533</sup> Nat'l Council on Disability, *Subminimum Wage and Supported Employment* p. 11 (Aug. 23, 2012) [https://www.ncd.gov/sites/default/files/NCD\\_Sub%20Wage\\_508.pdf](https://www.ncd.gov/sites/default/files/NCD_Sub%20Wage_508.pdf).

<sup>534</sup> Ibid., 11.

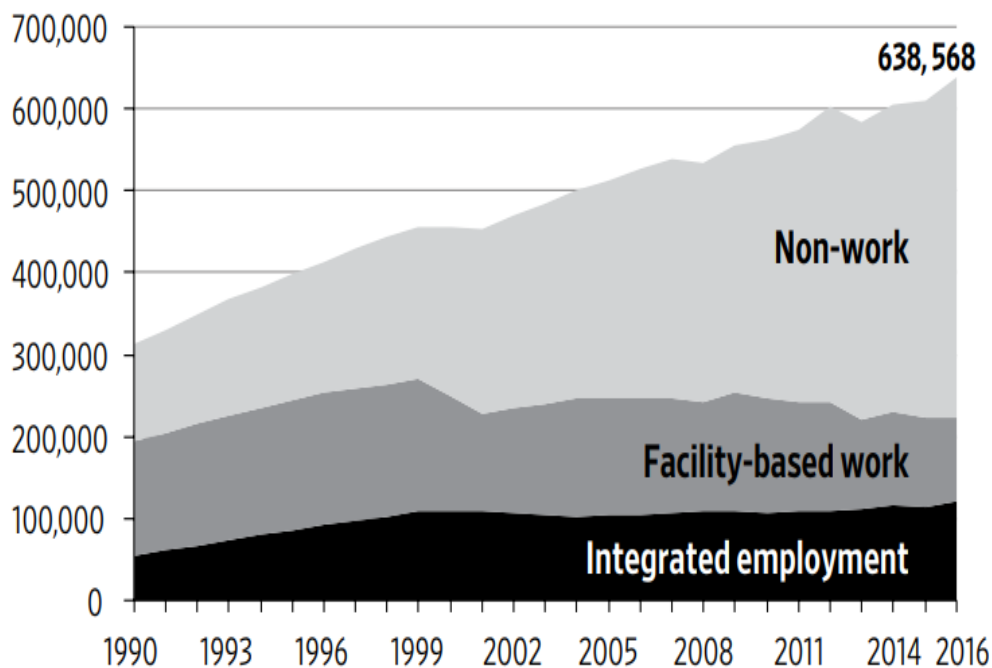
<sup>535</sup> Collins Testimony, *Subminimum Wages Briefing*, p. 275 (Research shows companies that promote disability inclusion are more profitable and are four times more likely to have a total shareholder return that outperforms their peers); DeSantis Statement, *Subminimum Wages Briefing*, pp. 3-4 (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]”).

“Research indicates that employees receiving supported employment services generate lower cumulative costs than employees receiving sheltered workshop services and that, whereas the cost-trend of supported employees shifts downward over time, the opposite is the case for people receiving sheltered workshop services.”<sup>536</sup>

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,<sup>537</sup> as over 93 percent of certificate holders are Community Rehabilitation Programs.<sup>538</sup>

**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.

<sup>536</sup> Nat'l Council on Disability, *Subminimum Wage and Supported Employment* p. 11 (Aug. 23, 2012) [https://www.ncd.gov/sites/default/files/NCD\\_Sub%20Wage\\_508.pdf](https://www.ncd.gov/sites/default/files/NCD_Sub%20Wage_508.pdf). (citing sources).

<sup>537</sup> See *infra* notes 851-896 (MVLE roundtable discussion).

<sup>538</sup> See *infra* note 599.



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 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.<sup>539</sup> 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.<sup>540</sup> 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.<sup>541</sup>

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.<sup>542</sup>

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<sup>539</sup> Butterworth Statement at 4.

<sup>540</sup> Ibid.

<sup>541</sup> See Figure 2.4

<sup>542</sup> *But Cf. infra* notes 1004-1006, 1015-1016; and Charts 4.6 (AZ Integrated employment rate), 4.7 (MO Integrated employment rate), and 4.5 (VA Integrated employment rate).

**Table 2.3: Change in Employment Rates of People with Disabilities in States that have Ended or Begun Phasing-Out Payment of Subminimum Wages**

<b>New Hampshire</b>	<u>2016</u>	<u>2017</u>
All disabilities	45.6%	45.0%
Cognitive disabilities	32.8%	34.9%
<b>Maryland</b>	<u>2016</u>	<u>2017</u>
All disabilities	42.2%	42.6%
Cognitive disabilities	31.7%	33.7%
<b>Maine</b>	<u>2016</u>	<u>2017</u>
All disabilities	32.4%	32.9%
Cognitive disabilities	23.3%	24.1%
<b>Vermont</b>	<u>2016</u>	<u>2017</u>
All disabilities	41.4%	45.9%
Cognitive disabilities	24.4%	41.3%

Source: Adapted from Christensen Statement at 7, data from American Community Survey, *Employment Rate Estimates*, retrieved from Cornell University Disability Statistics website: [www.disabilitystatistics.org](http://www.disabilitystatistics.org) (most recent data available from 2017).

However, the Commission's study of the same dataset across a different set of states, including states that retain 14(c), also show increases in employment rates for persons with disabilities in some of those states.<sup>543</sup>

According to Christensen, differences in state funding for integrated employment services may account for varied success in increasing integrated employment for people with disabilities.<sup>544</sup> Table 2.3 indicates that the employment rate for people with cognitive disabilities in Maryland increased marginally between 2016 and 2017, while the employment rate of people with cognitive disabilities in Vermont increased by a much larger margin. Between 2016 and 2017, Maryland cut the state's funding for integrated employment services by \$16 million, and New Hampshire reduced funding by roughly \$1 million.<sup>545</sup> Data regarding Maine's funding for integrated employment services was not available for 2016, however state funding declined from \$4.6 million in 2013 to approximately \$3.8 million in 2015, to approximately \$3.3 million in 2017.<sup>546</sup>

<sup>543</sup> See *infra* notes 819-824.

<sup>544</sup> See, Christensen Statement at 7.

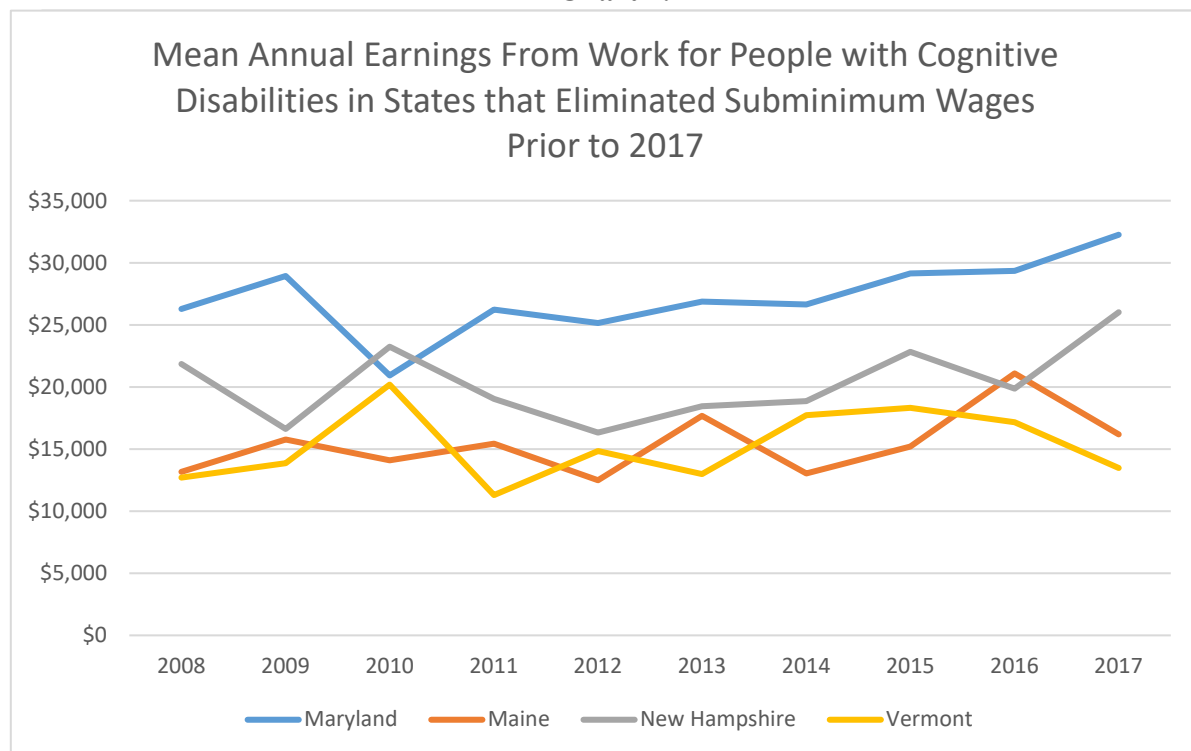
<sup>545</sup> Ibid.; UMass Boston, Institute for Community Inclusion, Statedata.info. (2020). State IDD Agencies. Maryland, Maine, New Hampshire, Vermont: Integrated employment funding. Retrieved 02/06/2020 from <http://www.statedata.info/data/showchart/573739>.

<sup>546</sup> UMass Boston, Institute for Community Inclusion, Statedata.info. (2020). State IDD Agencies. Maryland, Maine, New Hampshire, Vermont: Integrated employment funding. Retrieved 02/06/2020 from <http://www.statedata.info/data/showchart/573739>.

Meanwhile between 2016 and 2017, Vermont increased its funding for integrated employment services by approximately \$2 million.<sup>547</sup>

Chart 2.7 shows how wages for people with cognitive disabilities have changed between 2008 and 2017 in the four states that ended payment of subminimum wages to people with disabilities before 2017. In all four states, wages increased overall during the nine-year period. In New Hampshire, median annual wages increased since the state began phasing out subminimum wages in 2015. Similarly, in Maryland, wages increased since the phase-out of subminimum wages began in 2016. In Vermont and Maine, which both ended the payment of subminimum wages through changes to state Medicaid funding structures beginning in 2003 and 2005 respectively, wages increased, albeit less dramatically over time, and with a plunge from 2016 to 2017.

**Chart 2.7**



Source: UMass Boston, Institute for Community Inclusion, Statedata.info, *Cognitive Disability. Maryland, Maine, New Hampshire, Vermont: Mean annual earnings from work (in thousands of dollars)*. Retrieved 02/06/2020 from <http://www.statedata.info/data/showchart/918872>.

<sup>547</sup> Christensen Statement at 7; UMass Boston, Institute for Community Inclusion, Statedata.info. (2020). State IDD Agencies. Maryland, Maine, New Hampshire, Vermont: Integrated employment funding. Retrieved 02/06/2020 from <http://www.statedata.info/data/showchart/573739>.

However, the Commission's study of the same dataset across a different set of states, including states that retain 14(c), also show increases in earnings of persons with disabilities in some of those states.<sup>548</sup>

Available data regarding the number of people with disabilities who have moved from segregated employment to integrated employment after a state has eliminated 14(c) certificates varies state-to-state, as there is no national data tracking these transitions.<sup>549</sup> Some data about the number of people with disabilities working in integrated employment can be obtained from state agencies that provide employment services to people with intellectual and developmental disabilities. Chart 2.8 shows the total number of people with cognitive disabilities working in integrated employment in states that have begun phasing out or have completed their transition away from 14(c) certificates before 2017. What the data do not show is who the people with disabilities moving into or out of integrated employment are, and why they are doing so, including whether people with disabilities who are leaving subminimum wage employment are entering competitive integrated employment. As discussed herein, state budgets may provide one explanation for fluctuating employment numbers.<sup>550</sup>

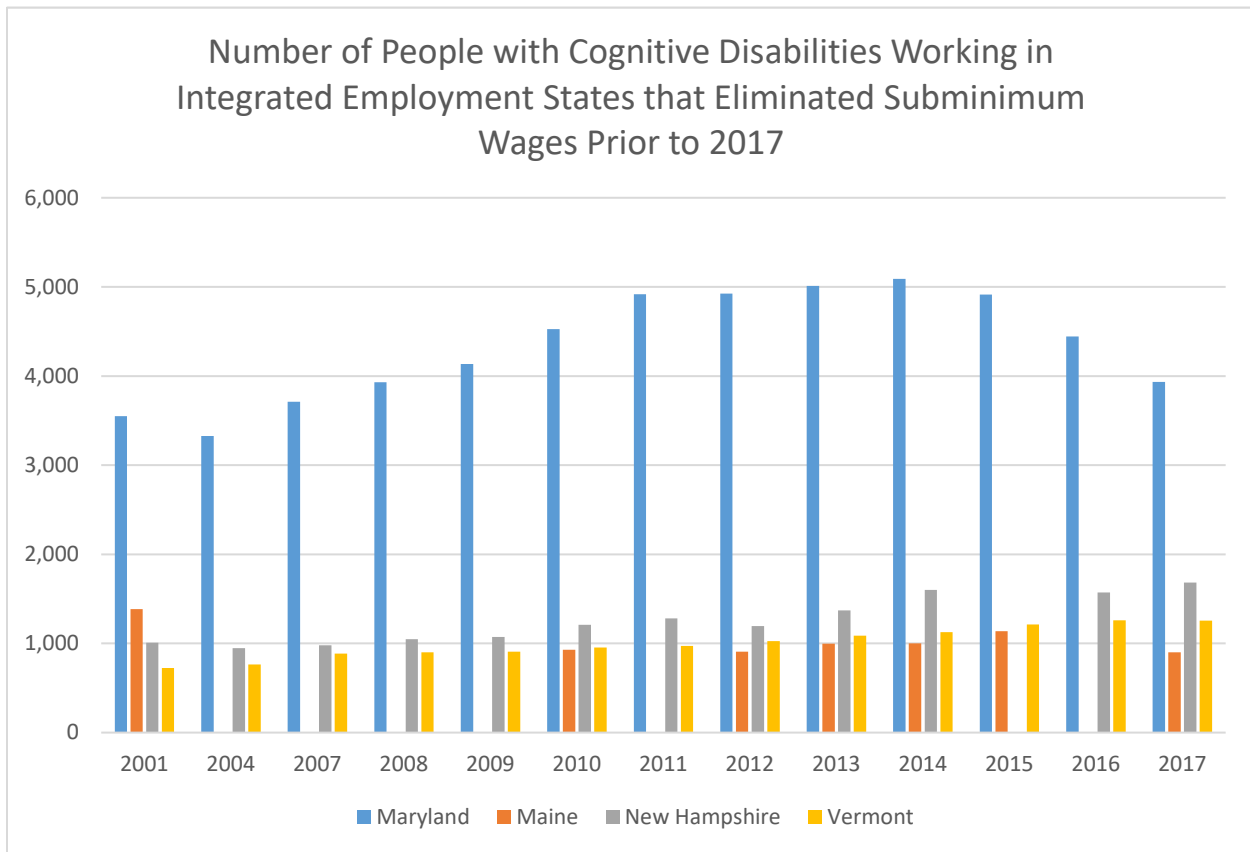
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<sup>548</sup> See *infra* note 824.

<sup>549</sup> Briefing Transcript at 88-119 (testimony of data experts).

<sup>550</sup> See *supra*, note 544.

Chart 2.8



Source: UMass Boston, Institute for Community Inclusion, Statedata.info. *State IDD Agencies. Maryland, Maine, New Hampshire, Vermont: Integrated employment, number*. Retrieved 02/07/2020 from <http://www.statedata.info/data/showchart/683574>.

However, the Commission's study of the same dataset across a different set of states, including states that allow subminimum wages, also show some increases in integration for persons with disabilities in some of those states.<sup>551</sup> Without a broader study, and considering the caveats of local economic conditions, whether or not there are support programs for transition, and community-level factors such as access to educational opportunities and accessible transportation, the data shows trends indicating that transitioning from 14(c) may be helpful, but they are only trends with a number of caveats to consider

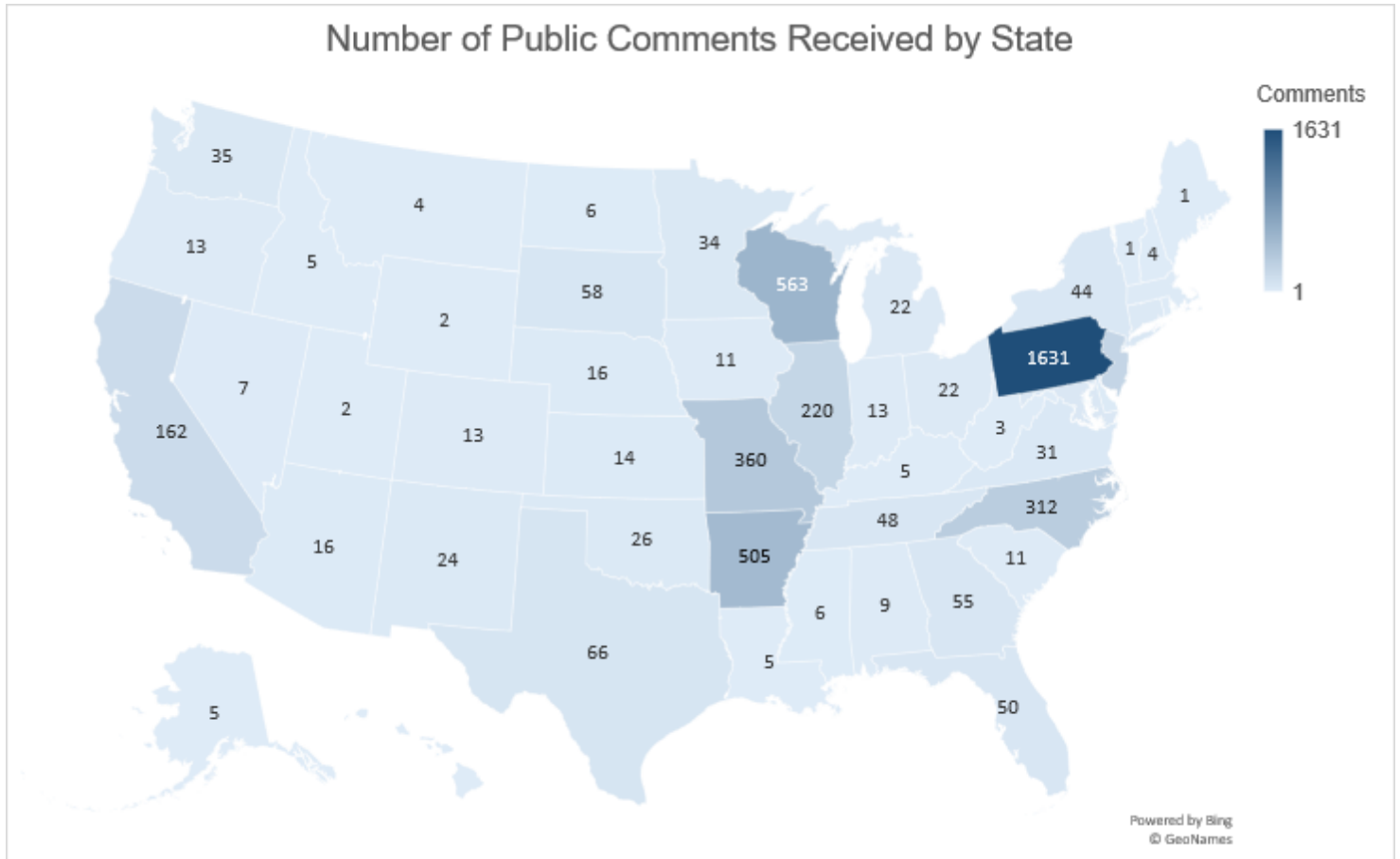
### Data Received From Public Comments

The Commission invited members of the public to share their opinion about the 14(c) certificate program during the open public comment period which ran from November 15, 2019 to December

<sup>551</sup> See *infra* notes 826-827.

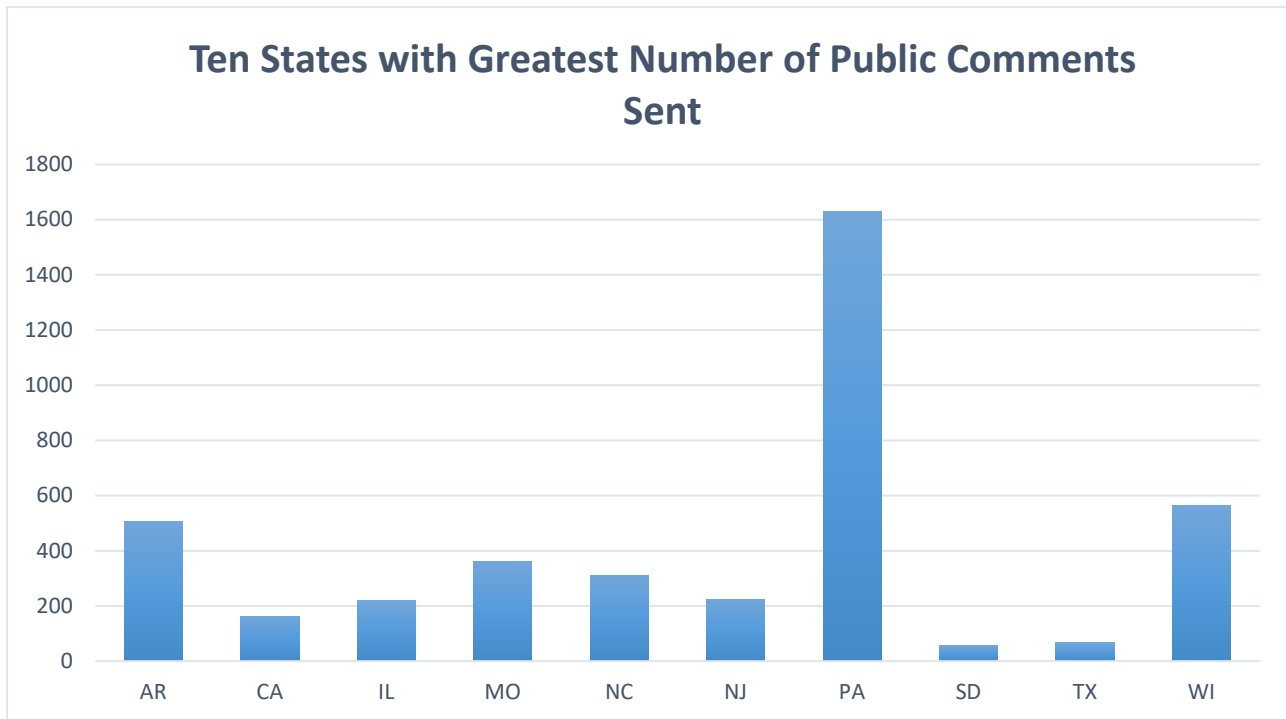
15, 2019. During that time, the Commission received over 9,700 public comments from individuals in all 50 states, the District of Columbia, Puerto Rico, and American Samoa, as well as from people in Canada, Mexico, the United Kingdom, Israel, Poland, Serbia, and Trinidad & Tobago. 1,631 individuals from Pennsylvania sent comments to the Commission, followed by 563 from Wisconsin, 505 from Arkansas, 360 from Missouri, and 312 from North Carolina.

**Figure 2.5**



Source: U.S. Commission on Civil Rights

Chart 2.9



Source: U.S. Commission on Civil Rights

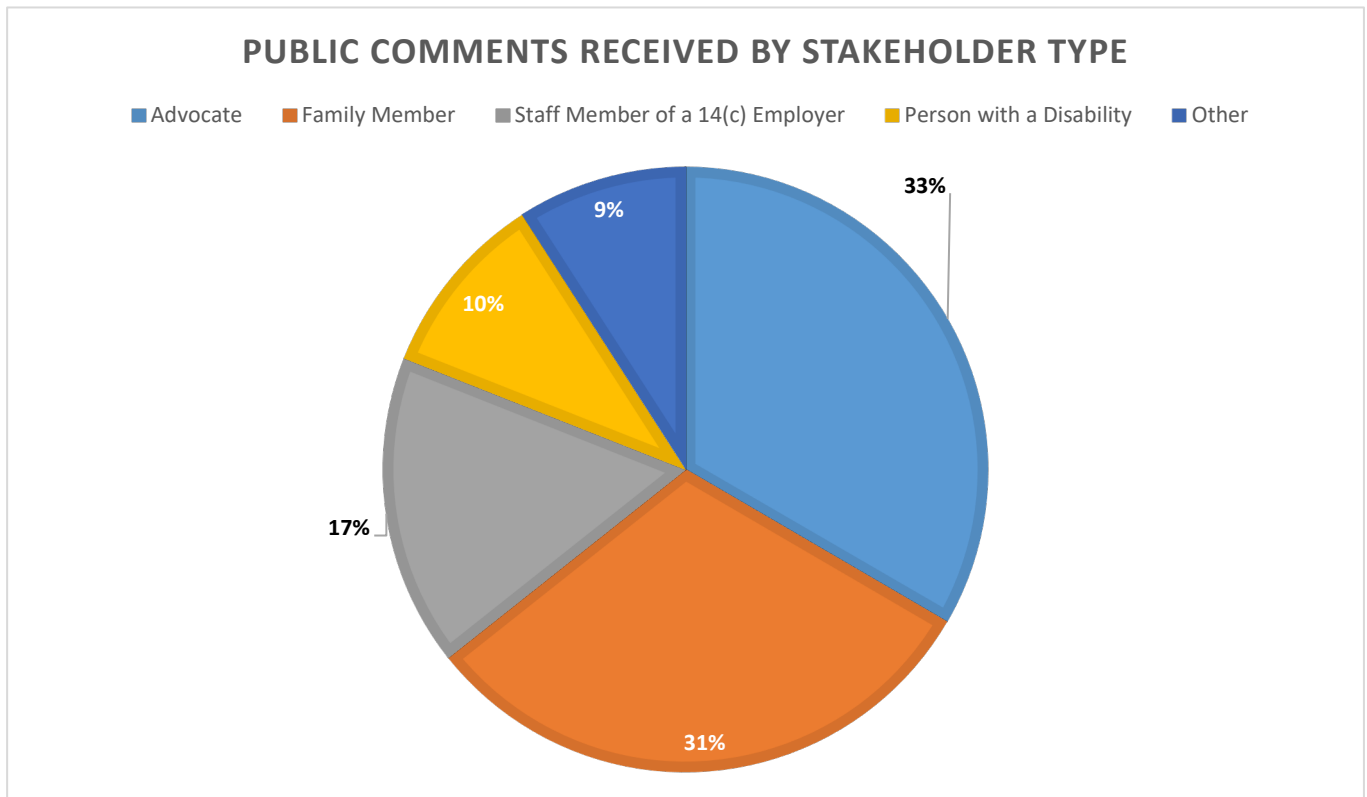
The Commission received comments from various different stakeholders with interest in the 14(c) program.<sup>552</sup> Thirty-three (33%) percent of the comments received came from an advocate. Thirty-one percent (31%) of comments received were sent by a family member of a person with a disability, seventeen percent (17%) came from staff members of 14(c) certificate holders. Self-identified individuals with disabilities made up ten percent (10%) of all public comments the Commission received. Nine percent of individuals who submitted public comments did not fit into any of the aforementioned categories.

Ninety-eight percent (98%) of people who sent a comment to the Commission expressed the opinion that the government should keep the 14(c) program. One percent (1%) of comments received advocated for the repeal or phase-out of 14(c), and another one percent (1%) of public comments did not express an opinion on whether to maintain 14(c) or do away with the program.

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<sup>552</sup> Stakeholders who sent public comments to the Commission may be identified by multiple categories.

Chart 2.10



Source: U.S. Commission on Civil Rights

The majority of the public shared their opinion with the Commission by adding their signatures to online petitions. Many of the petition signatures came from A-Team, a grassroots organization that supports the continued use of 14(c) certificates. One A-Team petition consisting of 4,687 signatures simply stated, “Support people with disabilities to choose where they want to work.”<sup>553</sup> Another petition circulated by A-Team to supporters of 14(c) consisting of approximately 1,452 signatures cautioned that, “If Section 14c were to be eliminated from the [[Fair Labor Standards Act], individuals with the most significant disabilities will lose their work opportunities and will be subject to staying at home, eventually succumbing to the desolation that can result from being inactive and unemployed. Everyone has a right to work.”<sup>554</sup> The A-Team petitions included signatures from people in all 50 states. The Commission also received a petition organized by Lighthouse Vocational Services, a 14(c) workshop located in Pennsylvania signed by 1,296 individuals that stated, “Support Employment CHOICE for People with Disabilities.”<sup>555</sup>

<sup>553</sup> A-Team Petition received Dec. 2019 (4,687 signatures).

<sup>554</sup> A-Team Petition received Dec. 2019 (1,452 signatures).

<sup>555</sup> Lighthouse Vocational Services Petition received Dec. 2019 (1,296 signatures).

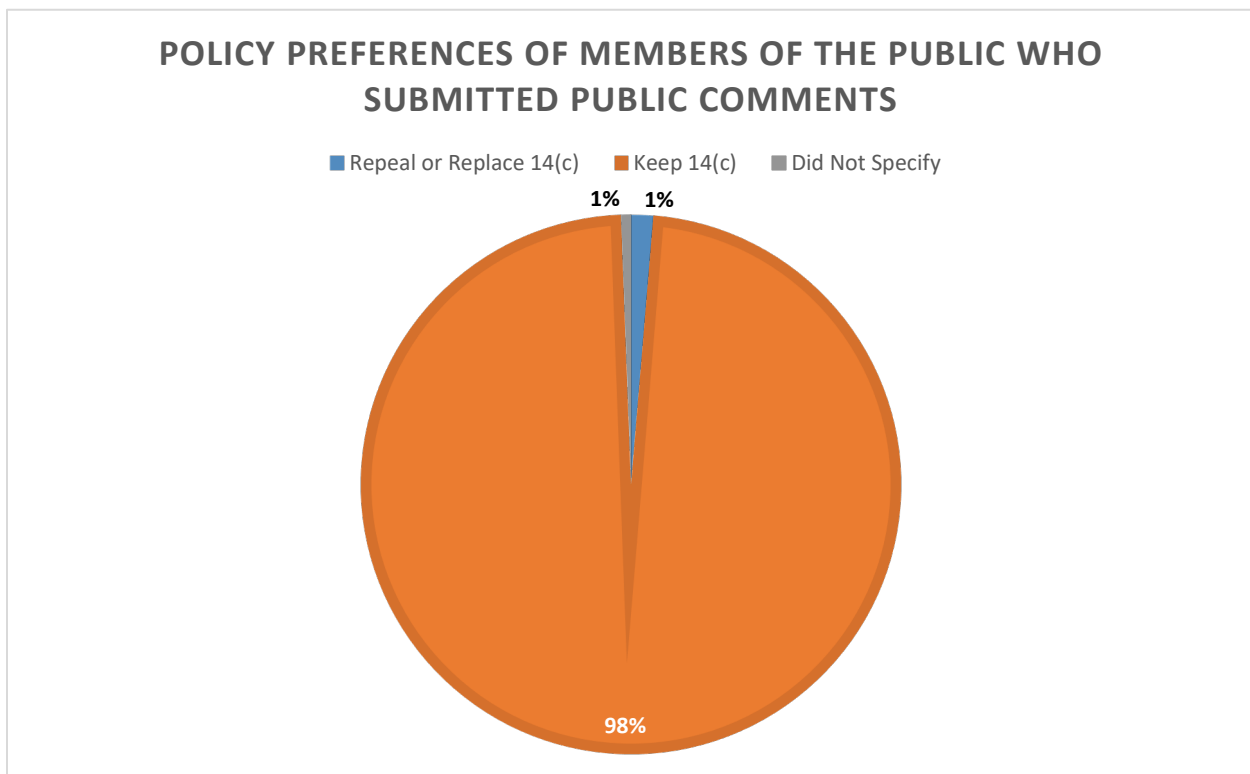


### *Public Comments Favoring Section 14(c)*

Common sentiments expressed in letters that support keeping 14(c) include the value in knowing that a loved one has a place to go each day, and the sense of value that one receives from being employed and receiving a paycheck, no matter how small. Family members of people with disabilities in particular argued that they and their relatives with disabilities should be able to choose where to work, and that working in 14(c) workshops is a choice that should not be taken away by federal legislative action. Many fear that after eliminating subminimum wage employment, people with disabilities will not be able to effectively compete in the open market and will end up unemployed. One commenter expressed that:

[Sheltered workshops] provide much more than a salary for people with I/DD. They provide an opportunity for an enriching life. Please do not eliminate sheltered workshops. These workshops serve a very needed and important role in the lives of people with disabilities. Many of these people do not understand the concept of money. Taking away the environment in which they thrive and feel comfortable would do more damage than increased wages would do good.<sup>556</sup>

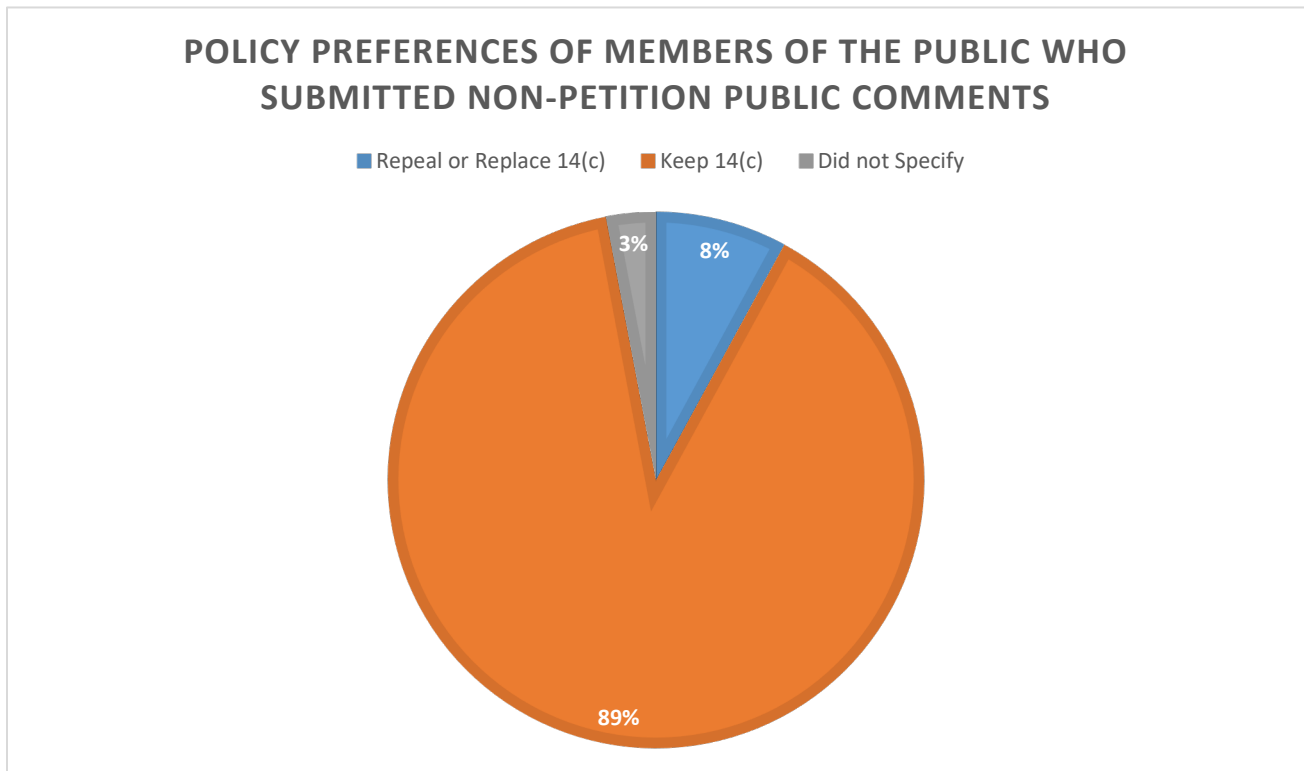
**Chart 2.11**



Source: U.S. Commission on Civil Rights

<sup>556</sup> Public Comment No. 509 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

Chart 2.12



Source: U.S. Commission on Civil Rights

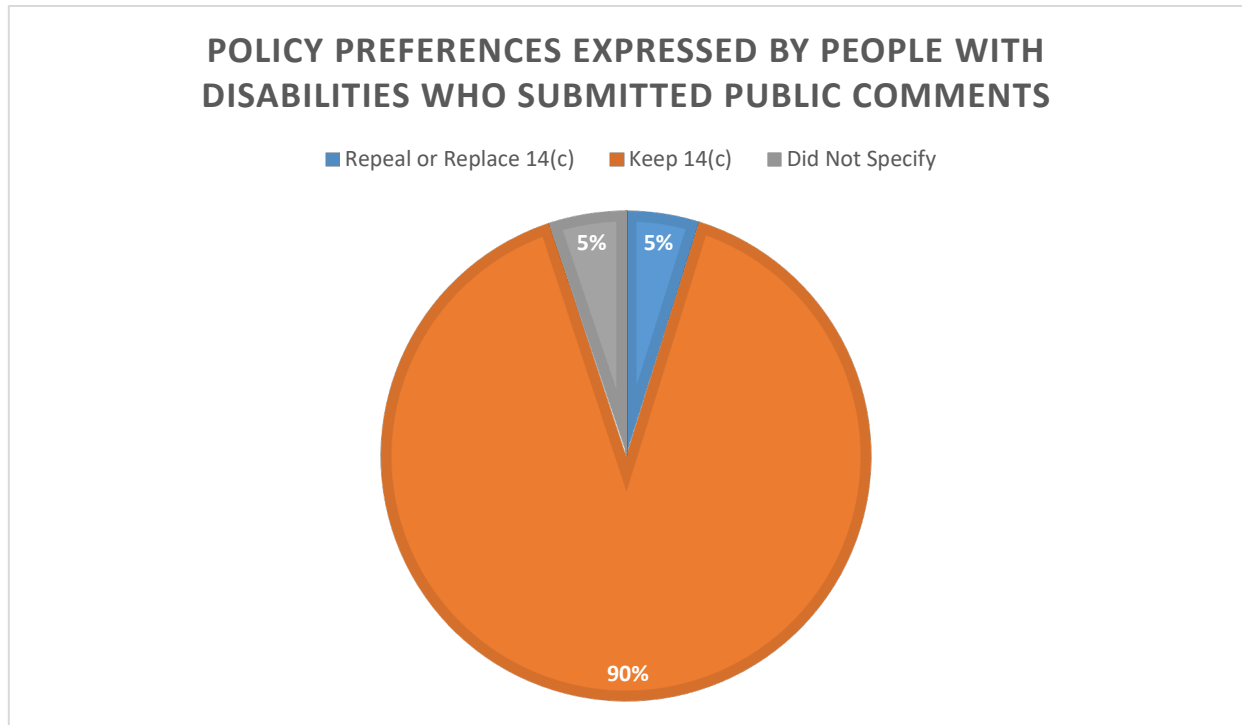
Many of the public comments the Commission received from people with disabilities expressed concern about losing a job or stated that the commenter enjoyed his or her job and did not want it to disappear. Some people with disabilities expressed that having the 14(c) program as an employment option protects their rights, and that it would be a violation of their civil rights to take away the choice to work for a 14(c) employer at a subminimum wage. One person with a disability emphasized the importance of choice, stating “I am here because I choose to be here and because this job matters to me. When you write your report on places like where I work, please remember me and don't take away my right to choose where I work.”<sup>557</sup> Another commenter stated that “I like being able to work and don't want to work at different places and feel like repealing [14(c)] would not let me continue working.”<sup>558</sup> People with disabilities also shared their concern that they may end up making less money if 14(c) were to be eliminated or phased out either due to not being able to work as many hours as before, or due to losing their employment completely.<sup>559</sup>

<sup>557</sup> Public Comment No. 6,444 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>558</sup> Public Comment No. 480 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

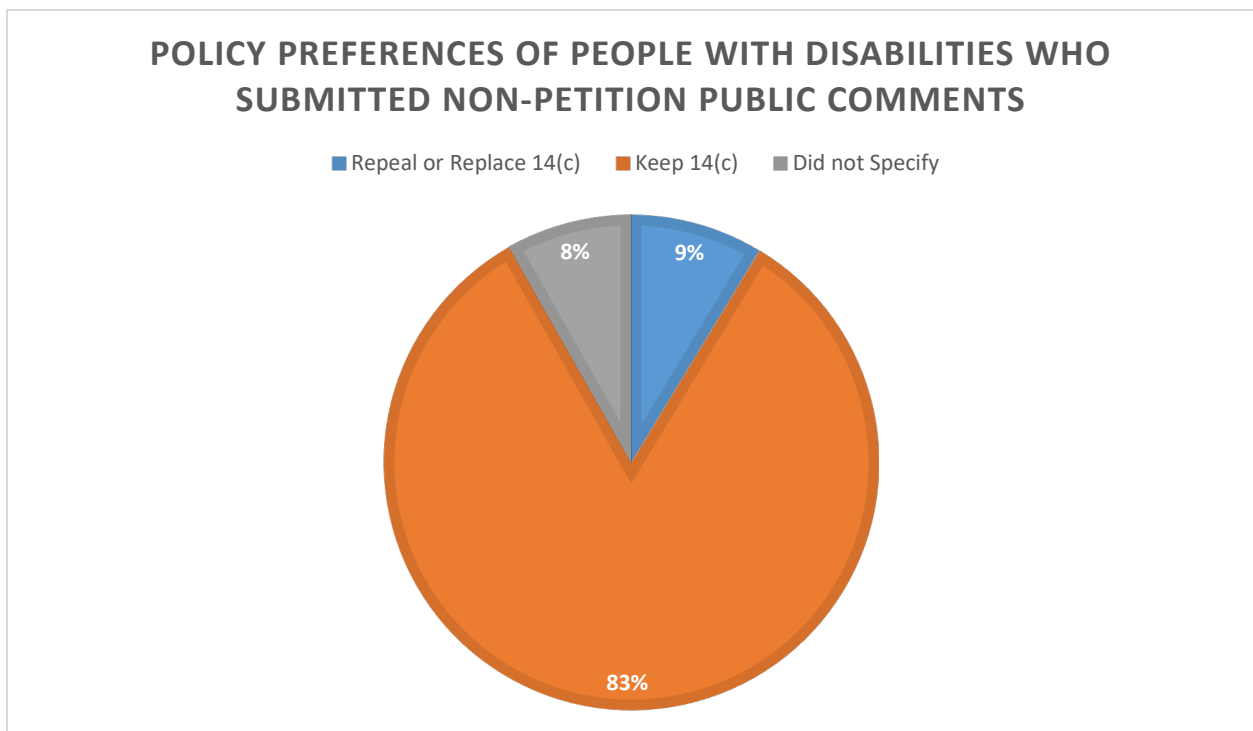
<sup>559</sup> See e.g., Comment Nos. 273, 1,200, 1,330, 2,095, for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

Chart 2.13



Source: U.S. Commission on Civil Rights

Chart 2.14



Source: U.S. Commission on Civil Rights

Another person with a disability discussed the social benefits received from work, stating, “I have been working 6 months but before I had no social life and was bored. The repeal of 14c would result in me losing friends and being unhappy.”<sup>560</sup> One person with a disability wrote about how employment at a 14(c) site adds value beyond a paycheck:

I like working at the workshop because I feel safe. It is easy to make friends. I like the different jobs we do (some better than others).

I use the money I earn to pay my share of rent at my brothers [sic] house. I am also able to take vacations with my family.

I think it would be hard to work at a normal job and compete with other high school graduates. IF [sic] I were not able to work and earn money, I would be sad because I could not afford things and I would be bored sitting around all day.<sup>561</sup>

Some people with disabilities who wrote to the Commission did not feel that the 14(c) program violated their rights. One commenter stated, “no one where I work feels as though their rights are being violated, or that they are being segregated in any way.”<sup>562</sup>

Family members or relatives of people with disabilities are an important constituency to include when debating the future of the 14(c) program. As discussed herein, studies show that family members are integral to change in 14(c) programs, often expressing concern or fear that their child or relative with a disability will not adapt well to integrated employment opportunities, or that they will not be able to find any employment in the competitive market.<sup>563</sup> The Commission received hundreds of comments from family members of people with disabilities, the majority of whom supported the continuation of the 14(c) program. Many family members of people with disabilities expressed the concern that their family members with disabilities were either unable to work in the community because of their disability, or that they had tried to obtain a job in the community and were unable to find employment. The parents of two people with disabilities wrote to the Commission explaining that:

[W]e depend on section 14C certificates to provide them the opportunity to work and earn a wage. Our children are unable to work in the community because of so many safety issues and the need for constant supervision. They have been working in a sheltered workshop

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<sup>560</sup> Public Comment No. 1,047 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

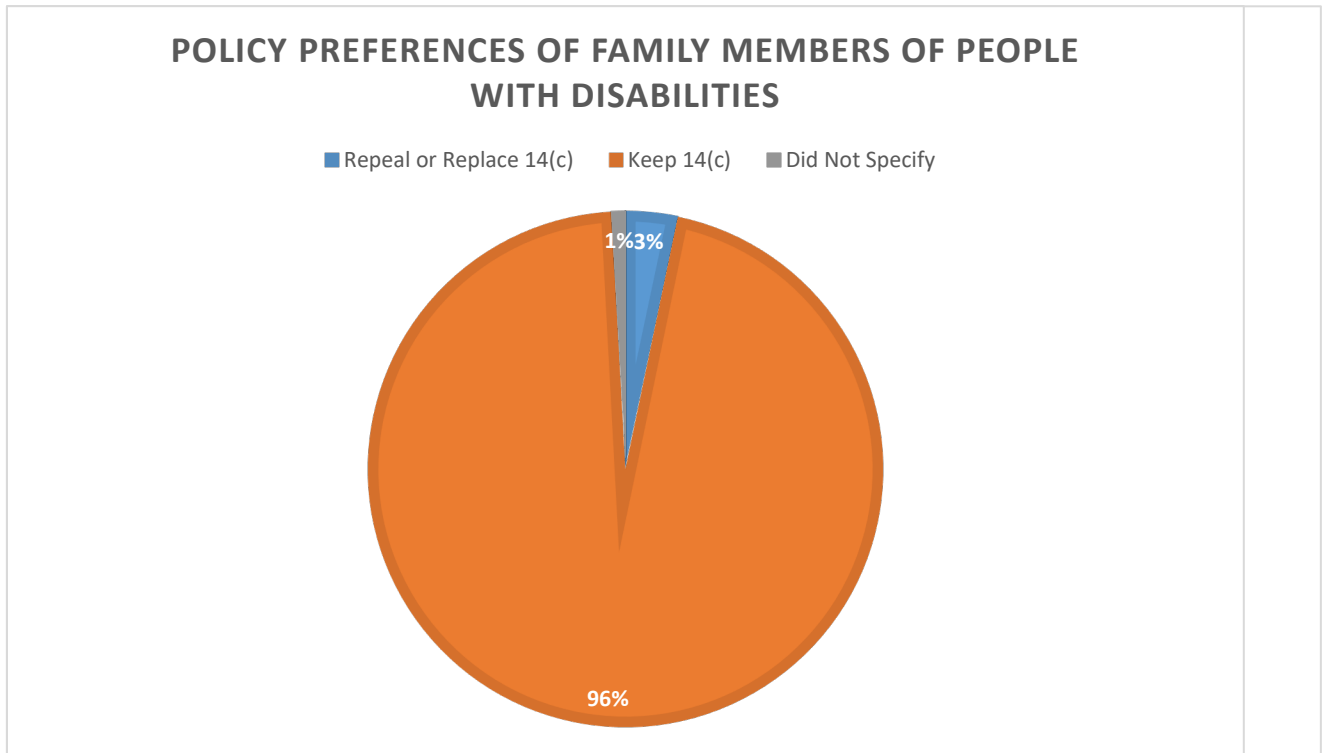
<sup>561</sup> Public Comment No. 408 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>562</sup> Public Comment No. 838 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>563</sup> See, *infra* note 1068.

for approximately 20 years, and they are so happy to be able to work there, and they are thrilled to receive a paycheck every two weeks.<sup>564</sup>

**Chart 2.15**

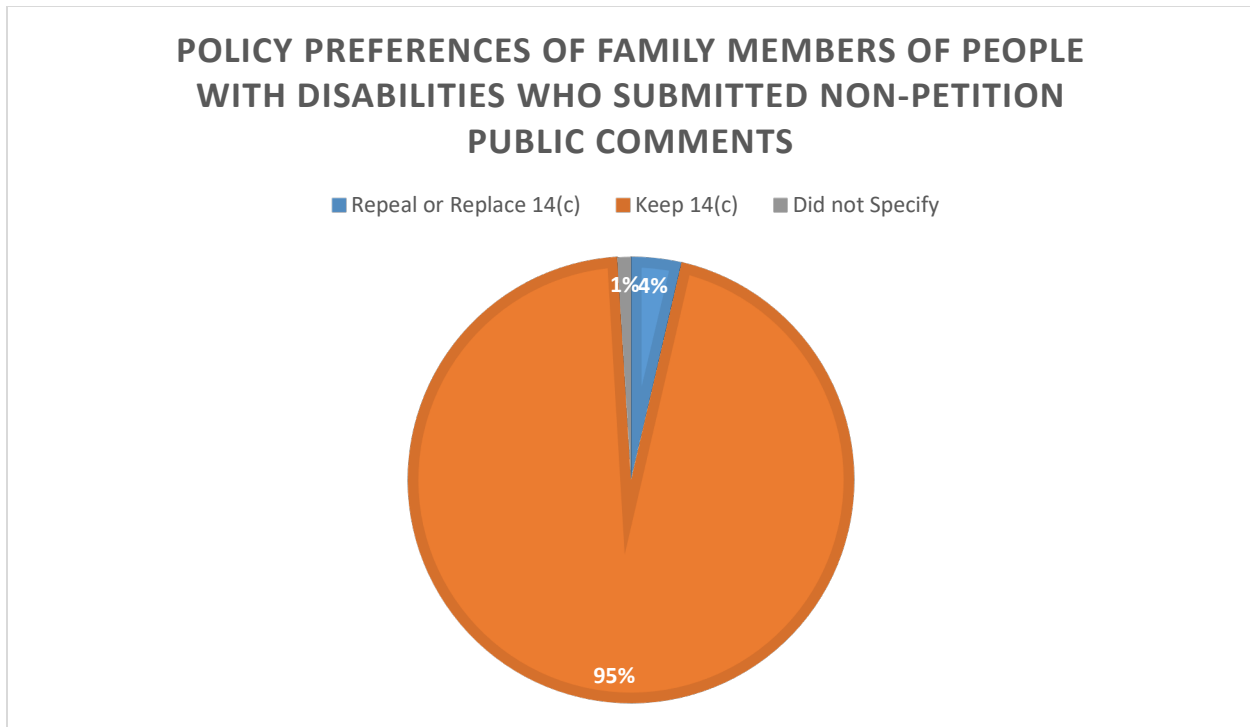


Source: U.S. Commission on Civil Rights

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<sup>564</sup> Public Comment No. 337 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

Chart 2.16



Source: U.S. Commission on Civil Rights

Another parent who wrote to the Commission was skeptical that many people with intellectual and developmental disabilities would be able to find a job in the community, stating that:

Where are [14(c)] participants going to find jobs out in the community where they can just show up when they want, work part time, work whenever they feel like it, and get paid the same as other people who can work at a 100% production rate vs. a 23% production rate or a 9% production rate? The answer is nowhere. Nobody is going to employ them unless they can perform at the same rate a person without disabilities could perform to.<sup>565</sup>

A parent of a person with a disability told the Commission about how the person had left employment in a 14(c) workshop, and how the parent wished that the person could return to the workshop:

There is a segment of the population that [sic] will never be able to get a minimum wage job in the community and needs the atmosphere of a productive workshop. It's very important to them and their caregivers. Please do not support any proposal that eliminates sub minimum wage jobs. The alternative in my son's life has played out and I wish he

<sup>565</sup> Public Comment No. 361 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

could go back to the productive workshop environment he needs and was so satisfying to him.<sup>566</sup>

Other parents emphasized that the choice to work in subminimum wage employment is the decision of the person with a disability and should not be eliminated. One parent compared the choice to work for a 14(c) certificate holder to the choice to pursue different types of higher education or training opportunities:

This diehard belief in competitive employment, to the exclusion of all other employment options for people with disabilities, is also unfair because it robs people with disabilities of options in life that people without disabilities have available to them. For example, some young adults decide to enroll in highly competitive Ivy League universities, others choose vocational programs at their area community college and still others pursue highly-skilled apprenticeships in the building trades.<sup>567</sup>

Many family members of people with disabilities also wrote that their relatives with disabilities should have the choice to work in 14(c) employment if they so wished, with some arguing that there is a right to work for a subminimum wage or in a sheltered workshop.<sup>568</sup> Parents of one person with a disability wrote, “[w]e are not concerned with lower pay. We are concerned that the rights of [our child] to work in a fulfilling, safe, stable job where she enjoys being part of a community is [sic] at risk due to wage debate.”<sup>569</sup>

Family members were also very concerned about whether there are adequate alternate opportunities for employment if 14(c) were to be eliminated. Many people who sent comments to the Commission shared that some 14(c) employers provide transportation for people with disabilities to and from their jobs, and that there are not sufficient transportation options available to transport people with disabilities to a job if 14(c) were to be eliminated. One family member of a person with a disability stated, “these programs provide more supervision, which protects a population vulnerable to abuse. Many provide transportation and close to full-time hours, which is extremely helpful for families.”<sup>570</sup> Another highlighted that 14(c) certificate holders often provide more than employment, stating that:

Programs that use 14c generally provide more supervision than typical workplaces. This helps workers with disabilities be more productive, but it also makes their environment more safe and secure for them. This is a population that traditionally is very vulnerable and

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<sup>566</sup> Public Comment No. 454 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>567</sup> Public Comment No. 433 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>568</sup> Commission analysis of public comments shows that 165 comments specifically mention choice as the principal reason to keep the 14(c) program.

<sup>569</sup> Public Comment No. 1,222 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>570</sup> Public Comment No. 362 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

has suffered very high percentages of abuse. Many 14c programs provide transportation services for their employees. This is a huge benefit. Transportation is one of the largest barriers to employment for people with disabilities.<sup>571</sup>

Furthermore, commenters stated that some expressed that since many 14(c) certificate holders offer services to people with disabilities other than employment, many of these services would not be provided in their community if 14(c) is eliminated without funding and planning for alternative service providers.<sup>572</sup> One commenter from New York stated: “People with disabilities want to and can work in mainstream jobs in their community and earn the same as their nondisabled peers but it’s not possible due to the fear of losing benefits and services.”<sup>573</sup>

### *Comments Against 14(c)*

Those advocating for the repeal or phase-out of 14(c) generally emphasize that services for people with disabilities should start with the presumption that all people are capable of work, and that no person should be paid less than the minimum wage because of who they are. A person with a disability who submitted a public comment to the Commission summarized the person’s rationale for ending the 14(c) program:

The subminimum wage is abusive and exploitative, as it encourages businesses to deem employees not productive so they can pay them less. The minimum wage should be just that -- the minimum -- and every human being doing a job should receive at least that much for their efforts. Allowing any people with disabilities to be paid under minimum wage is a message to society that we are less valuable because of our disabilities.<sup>574</sup>

Some people with disabilities also wrote to the Commission advocating for the elimination or phase out of 14(c). One commenter, discussing the inequities of 14(c), shared his experience working for subminimum wage:

Those who are opposed to the removal of sub-minimum wage will say that people deserving of this wage are happy to have a place to go and love their jobs. This is false and holds no merit in the necessity of the discussion at hand. I have worked in multiple sheltered workshops in multiple states, and the commonality is evident. The least respected of their assets are the people that [sic] work for them daily. In the last workshop I worked in, I made \$1.54 per hour and was told that I should be happy because I was the highest paid employee. In the midst of feeling completely disrespected, I worked on things that I

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<sup>571</sup> Public Comment No. 293 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>572</sup> See e.g., Public Comment Nos. 390, 506, 771, 2,031 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>573</sup> Public Comment No. 1,345 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>574</sup> Public Comment No. 786 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.



saw needed to be done. The grinder needed to be taken apart and have the blades replaced, and so, I offered to do this. A conveyor belt motor came in with it wired to run in reverse. I rewired the motor and saved down time. There were some electrical problems and I knew what to do to fix it, and I was permitted to make the repairs. All of these jobs that would have cost them over \$100 per hour, I did for \$1.54 per hour and was told that I should be grateful to have a job because I couldn't work anywhere else. I worked on a line directly across from the supervisor that [sic] made over \$100,000 per year, and I was producing 2 products to his 1. I was still paid \$1.54.<sup>575</sup>

He further discussed how upon leaving subminimum wage employment, he was able to find multiple jobs in the community:

I fortunately had someone who saw what I could do that [sic] gave me a chance. I have had several jobs since leaving the workshop scene. There have been times of prosperity and times of challenge. There have been times of success and times of failure. Most importantly, however, my experiences mirror that of my fellow Americans without a label of disability. So, I say again this discussion is truly about whether or not we see people with disabilities as sub-citizens deserving of less compensation, less dignity and less respect.<sup>576</sup>

Other people with disabilities who wrote to the Commission mirrored the sentiment that all people, regardless of ability, should be afforded the same opportunities. One current student wrote to the Commission about how she wants to have the same opportunities as others in the future, and wants the ability to live independently in the community:

When I get older, I would like to have a job so I can have my own apartment. I would like to choose where I work. I would like to work at a job where I receive a fair wage. I could not live in my own apartment if I received a sub-minimum wage. Please vote to end section 14(C) [sic] waiver program. I deserve to have the opportunity to reach my dreams.<sup>577</sup>

Charlotte Woodward, who testified in person at the Commission's briefing, spoke about how she feels 14(c) violates the rights of people with disabilities, "To pay people with disabilities including those with Down syndrome subminimum wage in sheltered workshops is a serious violation of their human rights."<sup>578</sup>

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<sup>575</sup> Public Comment No. 1,279 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>576</sup> Ibid.

<sup>577</sup> Public Comment No. 428 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>578</sup> Charlotte Woodward, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

*Comments Regarding Transition or Other Policies*

Many members of the public expressed nuanced opinions about the 14(c) program, recommending reform, better enforcement, or a gradual phase-out of the program. One commenter from Nebraska told the Commission that the protections of 14(c) should be better enforced, stating that: “When individual rights protected under 14c are violated those violations should be pursued aggressively.”<sup>579</sup> One family member from Pennsylvania suggested that the government “could reduce the approvals for 14c employers over time and gain data as to where people go, how it affects their lives and how to respect choice.”<sup>580</sup>

One disability rights group, the Survival Coalition of Wisconsin Disability Organizations, commented to the Commission to suggest that 14(c) certificate holders need more support before a successful phase-out of the 14(c) program can be effectuated, stating that:

Providers need a transparent rate process that incentives outcomes, and adequate support and training to transform their business and service delivery models. People with disabilities . . . need early expectations of employment and career in the community, ample opportunities to practice and gain skills, and service systems that are equipped to support them in those efforts.<sup>581</sup>

The Arc, a national disability rights organization, similarly stated in their public comment to the Commission that in phasing out 14(c) the organization advocates to:

Build infrastructure and supports needed to phase out the issuance of sub minimum wage certificates, increase opportunities for competitive integrated employment, and put in place safeguards to protect the interests of any people affected by this shift. In order to build capacity within the community, there must be a true understanding of, and commitment to, community employment for all individuals, including those with the most severe disabilities, from government agencies and from employers. Additionally, we must remove the barriers to community-based employment and build capacity in the community. Barriers to employment include, first and foremost, low societal expectations that foster job discrimination. Systemically, public resources fund service hours rather than outcomes and are often neither sufficient nor flexible enough to allow collaboration and blending of employment funding streams. Lack of other services like transportation or of accommodations such as assistive technology can also hinder success.<sup>582</sup>

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<sup>579</sup> Public Comment No. 1,282 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>580</sup> Public Comment No. 796 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>581</sup> Survival Coalition of Wisconsin Disability Organizations, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>582</sup> The Arc, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

The Michigan Developmental Disabilities Council, an independent state agency, stated in their public comment to the Commission that:

Aggressive funding is needed for technical assistance and rate restructuring for employment service providers to shift towards competitive integrated employment. [Persons with disabilities'] civil rights are violated by unfair and unjust employment placement, practices, and compensation due to the ability of employers to pay a subminimum wage under a 14(c) certificate and the placement of [persons with disabilities] in isolated settings.<sup>583</sup>

One individual wrote to the Commission with his suggestion that the government offer incentives to disability service providers and businesses to hire people with disabilities, stating that:

I would propose that the solution should involve robust incentives for community employment, both for employers and service providers who help people who have disabilities access the community labor market. Such incentives could be combined with benchmarks that tie the incentives to responsible reductions in the use of 14c provisions. Of course, any solution should have a responsible timeframe for compliance.<sup>584</sup>

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<sup>583</sup> Michigan Developmental Disabilities Council, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>584</sup> Public Comment No. 469 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

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## CHAPTER 3: THE FEDERAL GOVERNMENT'S ROLE AND RESPONSIBILITIES

This chapter examines federal agencies that have responsibilities related to the 14(c) certificate program. The first section describes the Wage and Hour Division of the Department of Labor, the federal agency that administers the 14(c) program, processes certificate applications and renewals, and monitors 14(c) certificate holders for compliance with the provisions of the Fair Labor Standards Act. As discussed herein, the Wage and Hour Division's jurisdiction is limited.<sup>585</sup> This chapter also examines the authority of the U.S. Department of Justice and the Equal Employment Opportunity Commission to ensure that people with disabilities are not being discriminated against in the employment context and are receiving services in the most integrated setting possible under the Americans with Disabilities Act. Finally, this chapter examines the importance of Medicaid funding to people with disabilities in employment settings, as well as the impact of the AbilityOne Commission on 14(c) employment of people with disabilities. This chapter also describes the limitations in oversight that may have led to gaps in civil rights protections of people with disabilities.

### Department of Labor Wage and Hour Division

Congress created the Wage and Hour Division of the U.S. Department of Labor with the passage of the Fair Labor Standards Act of 1938.<sup>586</sup> The Division is led by an Administrator, who is appointed by the President with the advice and consent of the U.S. Senate.<sup>587</sup> The Secretary of Labor designated the Wage and Hour Division of the Department of Labor as the agency responsible for the administration of the Fair Labor Standards Act Section 14(c) certificate program.<sup>588</sup> Associate Administrator for Policy Mary Ziegler, who retired in the interim, told the Commission that the Wage and Hour Division defined 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.”<sup>589</sup> In response to Commission interrogatories and document requests, the Wage and Hour Division stated that one of its goals is to “obtain and

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<sup>585</sup> See *infra* note 589.

<sup>586</sup> 29 U.S.C. § 204(a).

<sup>587</sup> *Id.*

<sup>588</sup> Sec'y of Labor's Order No. 01-2014, Delegation of Authority and Assignment of Responsibility to the Administrator, Wage and Hour Division, 79 Fed. Reg. 77,527 (Dec. 24, 2014) (Sec'y of Labor's Order No. 01-2014 added authority to the Wage and Hour Division to enforce Ex. Order 13,658, Establishing a Minimum Wage for Contractors, 79 Fed. Reg. 9,849 (Feb. 12, 2014); the Wage and Hour Division had previously had responsibility for administration and enforcement of the Fair Labor Standards Act, 75 Fed. Reg. 55,352).

<sup>589</sup> Mary Ziegler, Testimony, *Subminimum Wages Briefing*, p.25.

maintain compliance with the statutory and regulatory requirements of the Section 14(c) program.”<sup>590</sup>

Before an employer is permitted to pay a subminimum wage to any individual, it must apply for and obtain a certificate from the Wage and Hour Division. Employers must complete an Application for Authority to Employ Workers with Disabilities (a Subminimum Wages form) and send the completed form to the Wage and Hour Division.<sup>591</sup> Recently, the Wage and Hour Division has permitted 14(c) certificate applicants to complete their application using an online form.<sup>592</sup> As discussed above, one of Wage and Hour’s stated goals in redesigning the paper application form in 2016 was to be able to collect more data from 14(c) certificate holders about individuals working under 14(c) certificates, and better use that data in administering the program.<sup>593</sup> The Wage and Hour division also began moving applications to a digital format in 2018.<sup>594</sup> As discussed above, the Wage and Hour Division later told the Commission that the new digital form is the same as the old paper form.<sup>595</sup>

According to the Wage and Hour Division’s response to the Commission’s interrogatories and document requests, all new applications and renewal applications for a 14(c) certificate are processed by the Wage and Hour Division’s national certification team located in the Midwest regional office.<sup>596</sup> The national certification team is a group of five full time employees who review all applications.<sup>597</sup> During the last 10 years, the number of active and pending 14(c) certificates declined from 3,756 in 2009 to 1,558 in January of 2020.<sup>598</sup> As of January 2020, 93 percent of 14(c) certificates were issued to Community Rehabilitation Programs, and as of April 2019, over

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<sup>590</sup> Wage and Hour Division Response to USCCR Interrogatory No. 20 at 9.

<sup>591</sup> Wage and Hour Division Response to USCCR Interrogatory No. 19 at 8; *See also*, U.S. Dep’t of Labor Wage and Hour Division, Form WH-226 Application for Authority to Employ Workers with Disabilities at Subminimum Wages, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh226.pdf>.

<sup>592</sup> Wage and Hour Division Response to USCCR Interrogatory No. 19 at 8.

<sup>593</sup> Wage and Hour Division Response to USCCR Interrogatory No. 18 at 8; Wage and Hour Division, Response to Affected Agency Review, (May 19, 2020) (on file).

<sup>594</sup> *Id.*

<sup>595</sup> Wage and Hour Division, Response to Affected Agency Review, (May 19, 2020) (on file).

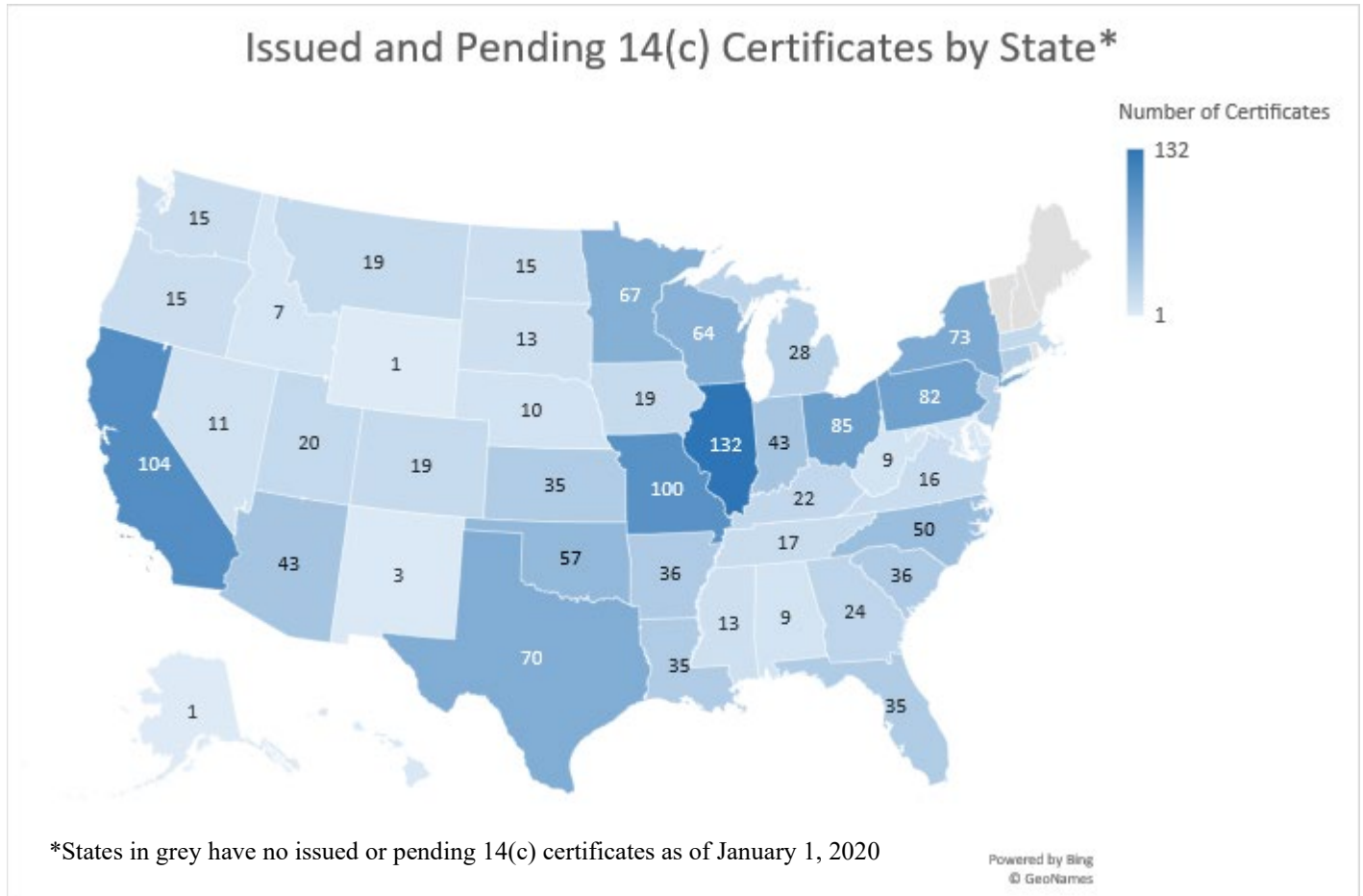
<sup>596</sup> Wage and Hour Division Response to USCCR Interrogatory No. 19 at 8.

<sup>597</sup> Mary Zeigler written testimony at 3

<sup>598</sup> Wage and Hour Division Response to USCCR Interrogatory No. 25 at 16.

80 percent of people served by a Community Rehabilitation Program were people with intellectual or developmental disabilities.<sup>599</sup>

**Figure 3.1**



Source: Wage and Hour Division, *14(c) Certificate Holders*, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders> (Data as of Jan. 1, 2020). Figure by U.S. Commission on Civil Rights

The certification team is charged with reviewing applications to identify any issues such as false or incomplete information that may appear on the face of the application.<sup>600</sup> An applicant for a 14(c) certificate must complete one form for each physical location where workers will be

<sup>599</sup> U.S. Dep't of Labor Wage and Hour Division, *14(c) Certificate Holders*, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders> (last accessed Apr. 6, 2020); 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*. University of Massachusetts Boston, Institute for Community Inclusion at 4; *See supra*, Note 448.

<sup>600</sup> Zeigler Statement, *Subminimum Wages Briefing*, at 3.

employed at subminimum wages.<sup>601</sup> Mary Ziegler, the Wage and Hour Division's Associate Administrator for Policy at the time, specifically noted at the Commission's November 2019 briefing that issuance of a 14(c) certificate is not a statement from the Wage and Hour Division that a certificate holder is in compliance with the requirements of the Fair Labor Standards Act.<sup>602</sup>

Instead, the application requires the employer to certify by submitting a signed application that:

1. Workers employed under the authority in 29 C.F.R. part 525 have disabilities for the work to be performed;
2. Wage rates paid to workers with disabilities under the authority in 29 C.F.R. part 525 are commensurate with those paid experienced workers, who do not have disabilities, in industry in the vicinity for essentially the same type, quality, and quantity of work;
3. The operations are and will continue to be in compliance with the [Fair Labor Standards Act], [Walsh-Healey Public Contracts Act], [McNamara-O'Hara Service Contracts Act], and Contract Work Hours and Safety Standards Act (CWHSSA), an overtime statute for Federal contract work, as applicable;
4. No deductions will be made from the commensurate wages earned by a patient worker to cover the cost of room, board or other services provided by the facility;
5. Records required under 29 C.F.R. part 525 with respect to documentation of disability, productivity, work measurements or time studies, and prevailing wage surveys will be maintained;
6. The wage rates of all hourly-rated employees paid in accordance with FLSA Section 14(c) will be reviewed at least every six months; and
7. Wages paid to all employees under FLSA Section 14(c) will be adjusted at periodic intervals, at least once a year, to reflect changes in the prevailing wage paid to experienced workers, who do not have disabilities, employed in the vicinity for essentially the same type of work.<sup>603</sup>

Further, the instructions to the application form remind 14(c) applicants that they must comply with all statutory and regulatory provisions of the Fair Labor Standards Act,<sup>604</sup> all applicable Federal laws, including the Americans with Disabilities Act, as amended, the Supreme Court's

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<sup>601</sup> WHD Response to USCCR Interrogatory No. 19 at 8.

<sup>602</sup> Zeigler Testimony, *Subminimum Wages Briefing*, p. 29.

<sup>603</sup> U.S. Dep't of Labor Wage and Hour Division, Form WH-226 Application for Authority to Employ Workers with Disabilities at Subminimum Wages, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh226.pdf>.

<sup>604</sup> 29 U.S.C. § 201 *et seq.*; 29 C.F.R. §§ 525.1-525.24.



*Olmstead* decision,<sup>605</sup> Executive Order 13658,<sup>606</sup> the Rehabilitation Act, as amended,<sup>607</sup> and any applicable state or local requirements.<sup>608</sup>

The Wage and Hour Division may deny an initial or renewal application for a 14(c) certificate for several reasons, including that the application has incomplete information, the application contains false statements, or the applicant has not included sufficient supporting documentation.<sup>609</sup> An applicant is given the opportunity to respond and remedy any identified deficiencies before a denial of the application by the Wage and Hour Division.<sup>610</sup>

If the Wage and Hour Division's concerns are not addressed in the applicant's response, or the applicant does not respond, the Division reports the application will be denied.<sup>611</sup> Any denied applicant has the right to petition the Wage and Hour Division for a review of the denial.<sup>612</sup>

Although the Department of Justice and the Equal Opportunity Employment Commission may litigate matters under their jurisdiction that pertain to 14(c) employers, such as alleged violations of the Americans with Disabilities Act,<sup>613</sup> the Department of Labor's Wage and Hour Division has legal authority to conduct oversight of 14(c) certificate holding entities for compliance with the Fair Labor Standards Act.<sup>614</sup> In response to Commission interrogatories, the Wage and Hour Division stated it was the "sole" federal agency with responsibility for conducting oversight of 14(c) certificate holders for compliance with the Fair Labor Standards Act.<sup>615</sup> The Wage and Hour Division stated in response to Commission interrogatories that it employs a multi-pronged approach to "maximize the effectiveness of our resources," including "complaint-based and planned investigations; outreach and education to employers and employees and partnerships with

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<sup>605</sup> *Olmstead v. L.C.*, 527 U.S. 581 (1999); *see infra*, note 651 ("Wage and Hour Division will work with the Department of Justice and will refer cases for further legal action to enforce the Americans with Disabilities Act or other civil rights laws when appropriate").

<sup>606</sup> *Establishing a Minimum Wage for Contractors*, 83 Fed. Reg. 44906 (Sept. 4, 2018) (implementing Ex. Order 13658).

<sup>607</sup> 29 U.S.C. § 794 *et seq.*

<sup>608</sup> *See*, U.S. Dep't of Labor Wage and Hour Division, Form WH-226 Application for Authority to Employ Workers with Disabilities at Subminimum Wages, at 6 <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh226.pdf>.

<sup>609</sup> 29 C.F.R. §§ 525.11, 525.13, 525.17(a)(1); Wage and Hour Division Response to USCCR Interrogatory No. 19 at 8.

<sup>610</sup> 29 C.F.R. §§ 525.11, 525.13(d); Wage and Hour Division Response to USCCR Interrogatory No. 19 at 8.

<sup>611</sup> Wage and Hour Division Response to USCCR Interrogatory No. 19 at 8. .

<sup>612</sup> 29 C.F.R. §§ 525.11, 525.18; Wage and Hour Division Response to USCCR Interrogatory No. 19 at 8-9.

<sup>613</sup> *See infra* notes 734-736 (DOJ) and 760-764 (EEOC).

<sup>614</sup> 29 U.S.C. § 204.

<sup>615</sup> Wage and Hour Division Response to USCCR Interrogatory No. 2 at 2.

other agencies, community organizations, business associations and other stakeholders; and increasing public awareness through media activities.”<sup>616</sup>

It stated that, as part of its compliance efforts, the Wage and Hour Division enforces the provisions of Section 14(c) of the Fair Labor Standards Act through investigations of employers who hold a Section 14(c) certificate.<sup>617</sup> The Division is authorized by the Fair Labor Standards Act and by regulations promulgated by the Department of Labor to conduct investigations of employers, including Section 14(c) certificate holders.<sup>618</sup> Furthermore, a person with disabilities working under a 14(c) certificate, or that person’s parent or guardian, is able to petition Wage and Hour Division to review whether the wage paid to the person is justified.<sup>619</sup> Wage and Hour Division elaborated in its interrogatory responses that:

[Wage and Hour Division] enforces and effectuates compliance with the statutory and regulatory requirements of Section 14(c) through the issuance of guidance materials, review of applications for 14(c) certificates, outreach to stakeholders, and the investigation of 14(c) certificate holders.<sup>620</sup>

The Division further stated that, when initiating an investigation into a 14(c) certificate holder, the Wage and Hour Division investigator reviews the certificate holder’s relevant records and the methodologies that the employer is using to maintain compliance with the Fair Labor Standards Act Section 14(c).<sup>621</sup> According to the Division, at the onset of the investigation, the investigator must notify the 14(c) certification team to ensure that the certificate holder in question is not recertified while a Wage and Hour Division investigation is pending, and to avoid duplication of efforts between investigators and the certification team.<sup>622</sup>

According to the Wage and Hour Division Field Operations Handbook, the Division should review whether the certificate holder is properly calculating the prevailing wage for work performed at the work site, conducting necessary time studies in the proper manner, and calculating

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<sup>616</sup> Wage and Hour Division Response to USCCR Interrogatory No. 20 at 9.

<sup>617</sup> Ibid.

<sup>618</sup> 29 U.S.C. § 211(a); *see also*, 29 C.F.R. § 525.19.

<sup>619</sup> 29 C.F.R. § 525.22.

<sup>620</sup> Wage and Hour Division response to USCCR Interrogatory No. 2 at 2. These are some of the main categories of compliance efforts that the Commission found to be essential to federal civil rights enforcement. *See*, U.S. Comm’n on Civil Rights, *Are Rights a Reality? Evaluating Federal Civil Rights Enforcement*, pp. 15-66 (Nov. 21, 2019) (discussing components of an effective federal civil rights enforcement program).

<sup>621</sup> Wage and Hour Division Response to USCCR Interrogatory No. 20 at 9; Wage and Hour Division, Field Operations Handbook Chapter 64 § 64f02(b) [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH\\_Ch64.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch64.pdf) (hereinafter WHD Field Operations Handbook).

<sup>622</sup> Wage and Hour Division Field Operations Handbook § 64f00(c).

commensurate wage rates properly.<sup>623</sup> The handbook states that the certificate holder is required to keep and provide sufficient documentation of each worker's disability that impairs the worker's productivity, and documentation for all steps of how the employer has calculated each worker's commensurate wage so that the Wage and Hour Division can conduct a comprehensive review of the certificate holder's practices.<sup>624</sup> The certificate holder must also maintain time and wage records for all employees consistent with the requirements of the Fair Labor Standards Act.<sup>625</sup>

According to the Wage and Hour Division Field Operations Handbook, if the Wage and Hour Division investigator encounters a deficiency during an investigation, the investigator "will" inform the employer of the deficiency during a final conference.<sup>626</sup> The handbook requires investigators to work with the employer to remedy the violation and bring the employer into compliance with the requirements of Section 14(c).<sup>627</sup> If voluntary compliance cannot be achieved by the investigator, the handbook instructs the district director or assistant district director, along with the regional enforcement coordinator and regional administrator, to determine appropriate further action.<sup>628</sup>

Investigations include, in most instances, an announced site inspection by the Wage and Hour Division investigator. According to the operations handbook, the investigator will send an appointment letter to the employer prior to visiting to ensure the presence of the executive director or his or her representative during the investigation.<sup>629</sup> According to the handbook, the appointment letter "shall specify the documents and records the [investigator] will need for reviewing and/or copying, and shall advise the employer that the [investigator] will be requesting a tour of the facility."<sup>630</sup> Unannounced site visits only occur in unusual or emergency situations (e.g. allegations of dangerous child labor violations), as follows:

For investigations involving work centers or patient workers, the WHI [Wage and Hour Investigator] shall send an appointment letter to the employer prior to visiting the establishment to ensure the presence of the executive director or his or her representative

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<sup>623</sup> 29 C.F.R. §§ 525.9, 525.10, 525.12(d)-(j); Wage and Hour Division Response to USCCR Interrogatory No. 20 at 9; Wage and Hour Division, Field Operations Handbook Chapter 64 § 64g03(j) [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH\\_Ch64.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch64.pdf)

<sup>624</sup> 29 U.S.C. § 211(c); *See*, 29 C.F.R. Part 516; WHD Field Operations Handbook § 64f01(a); Wage and Hour Division Response to USCCR Interrogatory No. 20 at 9.

<sup>625</sup> 29 C.F.R. § 525.16.

<sup>626</sup> Wage and Hour Division Response to USCCR Interrogatory No. 20 at 9; Wage and Hour Division Field Operations Handbook § 64h01(a).

<sup>627</sup> Wage and Hour Division Response to USCCR Interrogatory No. 20 at 9-10; Wage and Hour Division Field Operations Handbook § 64h01(b).

<sup>628</sup> 29 C.F.R. § 525.17(b); Wage and Hour Division Field Operations Handbook § 64h01(c)

<sup>629</sup> Wage and Hour Division Field Operations Handbook § 64f01

<sup>630</sup> *Ibid.*, § 64f01(b).

during the investigation. Unannounced visits prior to the initiation of an investigation should generally occur only in unusual, emergency-type situations, such as after receiving allegations of minors being placed at risk because their employment violates the child labor provisions.<sup>631</sup>

The Field Operations Handbook also states that during site visits, investigators should evaluate several factors, including the “apparent functioning level” of the workers with disabilities, and ensure that all workers being paid a subminimum wage have a documented disability for the work they are doing.<sup>632</sup> Investigators should also evaluate the production method(s) used for all major contracts held by the employer.<sup>633</sup>

If a 14(c) certificate holder refuses to remedy violations identified by a Wage and Hour investigator after having had an opportunity to demonstrate or achieve compliance with all legal requirements, the Wage and Hour Division may revoke a 14(c) certificate.<sup>634</sup> The first known revocation of a 14(c) certificate occurred in 2013, in relation to two Rhode Island programs, a work center and a school program that fed to the work center.<sup>635</sup> The revocation also required payment of back wages at applicable minimum wage for the entire period the certificates were revoked.<sup>636</sup> Wage and Hour Division told the Commission that it has only revoked 14(c) certificates of six employers.<sup>637</sup> The Division provided information about these revocations and settlement agreements reached with five of the employers; these five settlement agreements are attached as Appendix A to this report.<sup>638</sup>

Under federal regulations, Section 14(c) certificates may be revoked under the following circumstances:

§ 525.17 Revocation of certificates.

(a) A special minimum wage certificate may be revoked for cause at any time. A certificate may be revoked:

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<sup>631</sup> Ibid., § 64f02(a)(1).

<sup>632</sup> Ibid., § 64f02(a)(1).

<sup>633</sup> Ibid., § 64f02(a)(2).

<sup>634</sup> 29 C.F.R. § 525.17.

<sup>635</sup> Zeigler Statement, *Subminimum Wages Briefing*, at 7.

<sup>636</sup> Ibid., 8.

<sup>637</sup> Ibid.

<sup>638</sup> See, Appendix A.

(1) As of the date of issuance, if it is found that misrepresentations or false statements have been made in obtaining the certificate or in permitting a worker with a disability to be employed thereunder;

(2) As of the date of violation, if it is found that any of the provisions of FLSA or of the terms of the certificate have been violated; or

(3) As of the date of notice of revocation, if it is found that the certificate is no longer necessary in order to prevent curtailment of opportunities for employment, or that the requirements of these regulations other than those referred to in paragraph (a)(2) of this section have not been complied with.

(b) Except in cases of willfulness or those in which the public interest requires otherwise, before any certificate shall be revoked, facts or conduct which may warrant such action shall be called to the attention of the employer in writing and such employer shall be afforded an opportunity to demonstrate or achieve compliance with all legal requirements.<sup>639</sup>

The following table summarizes Commission staff's review of the terms of the settlement agreements Wage and Hour Division has reached when revoking 14(c) certificates.

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<sup>639</sup> 29 C.F.R. 525.17.

**Table 3.1: Section 4(e) Certificates Revoked by the Wage and Hour Division of the Department of Labor and Features of Relevant Settlement Agreements Under the Fair Labor Standards Act**

Certificate-Holding Employer	Location of Employer (City, State)	Dates of Alleged Violations	Date of Settlement Agreement	Amount of Back Wages Owed	Other Remedies Agreed To (in Addition to Revocation and Back Wages)	Additional Observations
Harold A. Birch Vocational Center and School <sup>640</sup>	Providence, Rhode Island	06/01/2010-04/12/2013	Jan. 2014	\$250,859.98	<ul style="list-style-type: none"> <li>• Compliance with all applicable provisions of the Act in the future (“Future Compliance”)</li> <li>• Back-pay of relevant public benefits such as social security, financial counseling and planning information to affected employees (“Public Benefits and Counseling”)</li> </ul>	<p>WHD determined the Employer willfully violated Section 4(c), sent letter of revocation, and determined employer is liable for back wages under Section 6 of the Act (“Willful Violation”)</p> <p>Parties agree noncompliance enforceable in federal court</p>
Becky Home Health Care	Surprise, Arizona	Unknown	Not applicable	Unknown	Unknown	No settlement agreement was entered into regarding revocation of certificate(s) <sup>641</sup>
Buckhannon-Upshur Work Adjustment Center, Inc. <sup>642</sup>	Buckhannon, West Virginia	03/13/2013-03/06/2016	May 2016	\$48,165.936	<ul style="list-style-type: none"> <li>• Civil money penalty of \$4,488.00</li> <li>• Future Compliance</li> <li>• Public Benefits; Counseling</li> <li>• Use of WHD Online Calculators</li> <li>• Review of WHD Power Point Materials</li> <li>• Attending Training</li> </ul>	<p>Willful Violation</p> <p>Parties agree noncompliance enforceable in federal court</p>
James L. Maher Center <sup>643</sup>	Middletown, Rhode Island	01/17/2015-01/14/2017	Sept. 2019	\$380,541.16	<ul style="list-style-type: none"> <li>• Public Benefits; Counseling</li> <li>• If representation of being currently in compliance is false, DOL may seek additional damages including civil money penalties</li> </ul>	<p>Willful Violation</p> <p>Employer did not intend to apply for another Section 4(c) certificate in the future</p>

<sup>640</sup> Settlement Agr., U.S. Sec’y of Labor and Providence Public School Dep’t (Jan. 30, 2014) (attached in Appendix A).

<sup>641</sup> Wage and Hour Division, Response to USCCR Follow-Up Question No. 1 at 1 (April 14, 2020) (on file).

<sup>642</sup> Settlement Agr., U.S. Sec’y of Labor and Buckhannon-Upshur Work Adjustment Center (May 5, 2016) (attached in Appendix A) (Buckhannon Upshur-Work Adjustment Center, Inc. is a certified 14(c) employer as of January 1, 2020, *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).

<sup>643</sup> Settlement Agr., U.S. Sec’y of Labor and James L. Maher Center (Sept. 23, 2019) (attached in Appendix A).

						Parties agree noncompliance enforceable in federal court
Training Thru Placement <sup>644</sup>	Providence, Rhode Island	06/01/2010-01/31/2013	Nov. 2014	\$300,000.00	Same as for Maher Center.	Willful Violation  Parties agree noncompliance enforceable in federal court
Rock River Valley Self Help Enterprises, Inc. <sup>645</sup>	Sterling, Illinois	04/18/2016-04/18/2018	May 2018	\$573,836.90	<ul style="list-style-type: none"> <li>• Public Benefits; Counseling</li> <li>• Employer to take “any and all steps necessary” to ensure proper payment of employees in compliance with Labor Act</li> <li>• Future applications or renewals for 4(c) certificates will be done at least annually</li> <li>• Improved prevailing wage survey &amp; commensurate wage calculation procedures</li> <li>• Payment of at least federal minimum wage for employees not paid pursuant to a subminimum wage certificate</li> <li>• Mandatory training for all staff, managers, and executives on 14(c) compliance</li> <li>• Improved record-keeping</li> <li>• Know Your Rights information for employees</li> <li>• Full compliance with Section 511 of the Rehabilitation Act, including career counseling, information and referrals, and information about self-advocacy, self-reliance, and peer mentoring training opportunities; documentation of additional services for youth under 24</li> </ul>	<p>Revocation through DOL findings and letter, followed by Employer petitioning for review by WHD Administrator, who referred the matter to an Administrative Law Judge to make factual findings and recommendations; parties agreed to settle.</p> <p>Employer assurances no known pending employee actions under Section 16(b) of the Labor Act; DOL representations no current or pending investigations.</p> <p>Hanging Consent Judgement attached to settlement agreement</p>

Source: Wage and Hour Division

<sup>644</sup> Settlement Agr., U.S. Sec’y of Labor and Training Thru Placement, Inc. (Nov. 10, 2014) (attached in Appendix A).

<sup>645</sup> Settlement Agr., U.S. Sec’y of Labor and Rock River Self Help Enterprises, Inc. (May 28, 2019) (attached in Appendix A).

These settlement agreements reflect that revocation has only been undertaken upon findings of willful violations, except in the case of Rock River Valley Self Help, which agreed to settle when their petition of the Wage and Hour Division's findings was referred to an Administrative Law Judge.<sup>646</sup> Another pattern among this small set of revocations is that civil money penalties, or the threat of civil money penalties, have only been agreed to in two of the matters.<sup>647</sup> Further, although there are promises for future compliance and the parties have agreed to enforce the terms of the settlement in court, the means by which such future compliance is guaranteed is not uniformly comprehensive. Only two of the settlement agreements specifically require training,<sup>648</sup> and the Rock River settlement agreement is much more precise and comprehensive in its terms than the others. Clearly, all require back pay, which is an important remedy, but not all precisely require systems to be put into place to help avoid future violations. Also, the Rock River settlement agreement includes terms for compliance with Section 511 of the Rehabilitation Act, which requires that 14(c) certificate holders provide career counseling, information and referrals, and information about self-advocacy, self-reliance, and peer mentoring training opportunities, along with additional services for youth under 24 years old.<sup>649</sup>

14(c) certificate holders may be required by Title I of the ADA to provide reasonable accommodations to people with disabilities; however, the Wage and Hour Division of the Department of Labor does not have the legal authority to ensure that people with disabilities are receiving proper accommodations.<sup>650</sup> In testimony to the Commission, Mary Ziegler stated that the Wage and Hour Division will work with the Department of Justice and will refer cases for further legal action to enforce the Americans with Disabilities Act or other civil rights laws when appropriate.<sup>651</sup> The Wage and Hour Division Field Operations manual also states that as one possible course of action when a certificate holder refuses to come into compliance with the Fair Labor Standards Act, the Division may refer the matter to the Solicitor of Labor for litigation.<sup>652</sup> The Wage and Hour Division referred the Rhode Island matter to the Department of Justice, which

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<sup>646</sup> Settlement Agr., U.S. Sec'y of Labor and Rock River Self Help Enterprises, Inc. (May 28, 2019) (attached in Appendix A).

<sup>647</sup> *Id.* and see Settlement Agr., U.S. Sec'y of Labor and Buckhannon-Upshur Work Adjustment Center (May 5, 2016) (attached in Appendix A).

<sup>648</sup> *Id.* (Buckhannon and Rock River Settlement Agreements).

<sup>649</sup> Settlement Agr., U.S. Sec'y of Labor and Rock River Self Help Enterprises, Inc. (May 28, 2019) (attached in Appendix A).

<sup>650</sup> 29 U.S.C. § 12112(b)(5)(A)-(B) (ADA requirement to provide reasonable accommodation in employment); Neil Romano, Response to USCCR Follow-Up Question No. 13 at 8; see also, U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, (Oct. 17, 2002), <https://www.eeoc.gov/policy/docs/accommodation.html>; see generally 29 U.S.C. § 214(c) (describing legal requirements of the 14(c) program and Department of Labor's authority to enforce provisions).

<sup>651</sup> Zeigler Statement, *Subminimum Wages Briefing*, at 9; See, 29 U.S.C. §§ 201-219; 29 C.F.R. §§ 525.1-525.24.

<sup>652</sup> Wage and Hour Division Field Operations Handbook § 64h01(c).



resulted in the Department of Justice securing a 10-year settlement agreement with the state of Rhode Island and City of Providence, Rhode Island.<sup>653</sup> At the Commission's briefing, Ziegler stated that, "we do, within the law, we do what we can. Of course, if the law were to change, we would change our enforcement and administration accordingly."<sup>654</sup> In responses to interrogatories, the Wage and Hour Division stated that most of its investigations are concluded administratively, and that cases are closed if the Wage and Hour Division considers that it has remedied any and all violations identified during the investigation.<sup>655</sup>

As shown in Table 3.2, during Fiscal Years 2009-2019, the Wage and Hour Division increased the number of 14(c) certificate holders investigated. (As shown in Table 3.3., during the same time period, the percent investigated also increased, from 3.54 to 13.95 percent.) There was also a substantial increase in the percentage of investigations that found a violation of the requirements of Section 14(c) of the Fair Labor Standards Act.<sup>656</sup> The Wage and Hour Division does not disaggregate the number of investigations by basis or cause, so the Commission is unable to determine the most common cause behind the staggering percentage of investigations that find a violation of Section 14(c) of the Fair Labor Standards Act.<sup>657</sup> However, the data is clear that most investigations do not lead to certificate revocation—in fact the first known revocation of a 14(c) certificate happened in 2013, one of only six certificate revocation actions to have been taken.<sup>658</sup> The data also show that the main remedy is back pay, and that each year, thousands of employees with disabilities have been owed back pay from 14(c) employers. For example, in FY 2018, for each case concluded, there was an average of 50 employees who were owed back pay by that 14(c) certificate holder.<sup>659</sup>

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<sup>653</sup> See, Settlement Agreement, *United States v. Rhode Island and City of Providence*, No. 1:13-cv-00442 (D. RI. 2013) (The district court terminated the settlement agreement with the City of Providence in 2019 after an independent court monitor found the City had complied with the terms of the agreement. The Agreement with the State of Rhode Island remains in effect).

<sup>654</sup> Zeigler Testimony, *Subminimum Wages Briefing*, p. 81.

<sup>655</sup> Wage and Hour Division Response to USCCR Interrogatory No. 25 at 16.

<sup>656</sup> Wage and Hour Division Response to USCCR Interrogatory No. 25 at 15.

<sup>657</sup> WHD Response to USCCR Interrogatory No. 21 at 10; See, Wage and Hour Division Field Operations Handbook §64e00(c) (listing most common violations found during 14(c) investigations) [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH\\_Ch64.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch64.pdf).

<sup>658</sup> Ziegler Statement, *Subminimum Wages Briefing*, at 8.

<sup>659</sup> See Table 3.2, FY 2018: 9,647 employees owed back pay/193 cases completed x 100 = 49.98%.

**Table 3.2: Wage and Hour Division 14(c) Certificate Holders Investigated per Fiscal Year**

<b>Year</b>	<b>Concluded Cases</b>	<b>Registered Cases</b>	<b>Percent Violation Cases</b>	<b>Number of Employees of 14(c) Certificate Holders Owed Back Wages</b>	<b>Average Days Open</b>
<b>FY 2009</b>	133	256	73%	3,369	156
<b>FY 2010</b>	153	326	61%	4,196	259
<b>FY 2011</b>	360	226	83%	11,571	340
<b>FY 2012</b>	258	308	85%	9,556	219
<b>FY 2013</b>	238	266	82%	7,445	220
<b>FY 2014</b>	284	325	82%	8,986	229
<b>FY 2015</b>	189	193	80%	7,842	322
<b>FY 2016</b>	201	252	83%	9,133	356
<b>FY 2017</b>	217	224	90%	7,302	358
<b>FY 2018</b>	193	198	91%	9,647	403
<b>FY 2019</b>	227	213	86%	9,005	407

Source: Wage and Hour Division

The number of investigations in each fiscal year as reported by the Wage and Hour Division to the Commission includes all types of certificate holders (Business Establishment certificates, Patient Worker certificates, School Experience Work Program certificates, and Community Rehabilitation Programs).<sup>660</sup> The pattern of violations is not limited to one sector but instead spread across the range of types of 14(c) certificate holders.

Over a ten-year period from FY 2009 to FY 2019, the Wage and Hour Division increased the number of concluded investigations of certificate holders from 133 in FY 2009 to 227 in FY 2019, with a fiscal-year high of 360 investigations concluded in FY 2011.<sup>661</sup> As evidenced by Table 3.3,

<sup>660</sup> Wage and Hour Division Response to USCCR Interrogatory No. 21 at 10.

<sup>661</sup> Id.

below, that same period was accompanied by a drop in the overall number of certificate holders nationwide from 3,756 certificate holders in FY 2009 to 1,627 certificate holders in FY 2019.<sup>662</sup>

**Table 3.3: Percentage of 14(c) Certificate Holders Investigated in FY 2009-2019**

<b>Fiscal Year</b>	<b>Cases</b>	<b>Regulated Community</b>	<b>Ratio Investigated</b>
<b>2009</b>	133	3,756	3.54%
<b>2010</b>	153	3,350	4.57%
<b>2011</b>	360	3,285	10.96%
<b>2012</b>	258	3,235	7.98%
<b>2013</b>	238	3,112	7.65%
<b>2014</b>	284	2,985	9.51%
<b>2015</b>	189	2,741	6.90%
<b>2016</b>	201	2,638	7.62%
<b>2017</b>	217	2,545	8.53%
<b>2018</b>	193	1,785	10.81%
<b>2019</b>	227	1,627	13.95%

Source: Wage and Hour Division, response to USCCR Interrogatory No. 25 at 16 (on file).

In Fiscal Year 2019, the Wage and Hour Division concluded 227 investigations, amounting to nearly 14 percent of all Section 14(c) certificate holders.<sup>663</sup> Wage and Hour Division investigations during FY 2019 recovered nearly \$2.5 million in back wages owed by 14(c) certificate holders to employees with disabilities.<sup>664</sup> The Wage and Hour Division initiates compliance investigations “both in response to complaints and data-driven, agency-initiated investigations.”<sup>665</sup> Wage and

<sup>662</sup> Although this data is only a “snapshot” over time, *see supra* notes 457- 463, the ten-year trend clearly shows a drop in the overall number of certificate holders. See Table 3.2.

<sup>663</sup> Zeigler Statement, *Subminimum Wages Briefing*, at 6.

<sup>664</sup> *Ibid.*

<sup>665</sup> *Ibid.*

Hour Division did not provide information to the Commission regarding what data it uses to begin agency-initiated investigations.<sup>666</sup>

At the end of FY 2019, the Wage and Hour Division employed 780 investigators nationwide,<sup>667</sup> to cover its five regions and 54 district offices located throughout the country.<sup>668</sup> The investigators are not 14(c) specialists, as they are responsible for investigating alleged violations of any laws covered under the Wage and Hour Division's jurisdiction.<sup>669</sup> However, the Wage and Hour Division does employ one 14(c) coordinator located in each of its five regional offices.<sup>670</sup>

A 2009 Government Accountability Office report found that complaint processing at the Wage and Hour Division was inadequate and offered recommendations on how the Wage and Hour Division could improve its complaint process.<sup>671</sup> To understand and evaluate the Wage and Hour Division's complaint process, the Government Accountability Office filed ten undercover, fictitious complaints with the Division to assess the efficiency and adequacy of complaint processing.<sup>672</sup>

The inadequacies that the Government Accountability Office found in the Wage and Hour Division's complaint process included delays in investigations, failure to make use of all available enforcement tools, failure to follow up with employers who agreed to pay, an ineffective complaint process, and sporadic use of the Wage and Hour Division's electronic database to record cases.<sup>673</sup> For example, half of the fictitious complaints filed by the Government Accountability Office (5 out of 10) were not recorded in the Wage and Hour Division's database.<sup>674</sup>

The Department of Labor provided a response to the Government Accountability Office and stated that it agreed with recommendations contained in the report and had already begun implementing

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<sup>666</sup> Wage and Hour Division Response to USCCR Follow-Up Question No. 9 at 9 (“[Wage and Hour Division] uses a variety of strategies to determine the best use of our enforcement resources and does not disclose specific strategies currently being implemented. We can, however, disclose that [Wage and Hour Division] is currently taking a cross-regional approach to Section 14(c) enforcement, including Regional and National Office input on case selection.”).

<sup>667</sup> Zeigler Statement, *Subminimum Wages Briefing*, at 6.

<sup>668</sup> WHD Response to USCCR Interrogatory No. 4 at 2-3; WHD Local Offices, <https://www.dol.gov/agencies/whd/contact/local-offices> (last accessed Jan. 31, 2020); Ziegler Statement, *Subminimum Wages Briefing*, at 6.

<sup>669</sup> Statement, *Subminimum Wages Briefing*, *Ibid.*

<sup>670</sup> Zeigler Statement, *Subminimum Wages Briefing*, at 6.

<sup>671</sup> U.S. Gov't Accountability Office, Report to the Cmte on Education and Labor, House of Representatives; Department of Labor: Wage and Hour Division Needs Improved Investigative Processes and Ability to Suspend Statute of Limitations to Better Protect Workers Against Wage Theft (June 2009) <https://www.gao.gov/assets/300/291496.pdf>.

<sup>672</sup> *Ibid.*, 2.

<sup>673</sup> *Ibid.*, 3.

<sup>674</sup> *Ibid.*, 4.

them.<sup>675</sup> The Department of Labor also stated that the full picture of efforts made to investigate or address allegations of violations often cannot be obtained from reviewing the database records or the physical case files.<sup>676</sup> The Department of Labor referenced one scenario cited in the Government Accountability Office report about an alleged child labor violation in a meatpacking plant that was not recorded in the Wage and Hour Division's database, that led to assumptions that the Wage and Hour Division failed to investigate those allegations.<sup>677</sup> However, the Department of Labor stated that Wage and Hour Division staff took immediate action to analyze the anonymous complaint and identified several deficiencies in the complaint that prohibited staff from taking further action.<sup>678</sup> The Department of Labor stated that the complaint was not entered into the agency's database because it was found to be suspect.<sup>679</sup>

As a result of its investigation, the Government Accountability Office recommended that Congress suspend the statute of limitations for filing complaints imposed on impacted employees.<sup>680</sup> The statute of limitations is currently set at two years from the date that the alleged violation occurred for complaints filed under the Fair Labor Standards Act, or three years for willful violations.<sup>681</sup> The Government Accountability Office also provided recommendations to the Secretary of Labor, including that the Wage and Hour Division Administrator should reassess policies and processes and revise as appropriate to ensure information is recorded in the Wage and Hour Division's case database.<sup>682</sup> The Government Accountability Office report also recommended that the Wage and Hour Division improve customer service through review of intake and resolution process, consider providing more automated research tools to Wage and Hour Division investigators to increase their efficiency, consider gaining access to IRS information to allow investigators to more easily verify

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<sup>675</sup> Ibid., pp. 46-52.

<sup>676</sup> Ibid., pp. 46-48.

<sup>677</sup> Ibid., pp. 48-49.

<sup>678</sup> Ibid.

<sup>679</sup> Ibid.

<sup>680</sup> Ibid., 8.

<sup>681</sup> 29 U.S.C. § 255. A bill introduced in both chambers of Congress in July 2019, Wage Theft Prevention and Wage Recovery Act, H.R. 3712/S. 2101, 116th Cong., would extend the statute of limitations from two to four years. This bill with Democratic but no Republican co-sponsors was introduced concurrently in the U.S. House of Representatives and the U.S. Senate on July 11, 2019, and referred to House Committee of Labor and Education on same date, but there have been no actions since the date of introduction and referral to committee. See Congress.gov, Wage Theft Prevention and Wage Recovery Act, <https://www.congress.gov/bill/116th-congress/house-bill/3712/all-actions> (accessed May 25, 2020).

<sup>682</sup> U.S. Gov't Accountability Office, Report to the Cmte on Education and Labor, House of Representatives; Department of Labor: Wage and Hour Division Needs Improved Investigative Processes and Ability to Suspend Statute of Limitations to Better Protect Workers Against Wage Theft, p. 9 (June 2009).

information provided by employers, and better monitor the volume of cases to ensure that Wage and Hour Division investigators are able to manage caseloads.<sup>683</sup>

The Wage and Hour Division reported that in the decade following the 2009 Government Accountability Office Report, it had strengthened its enforcement and administration of the 14(c) program.<sup>684</sup> Initiatives undertaken included modernizing the Wage and Hour Division certificate application processing by launching a new online certificate application, redesigning its application forms to collect more data about individuals employed on 14(c) certificates, and clarifying requirements for submission of accurate and timely applications.<sup>685</sup> The Wage and Hour Division also reported increasing compliance assistance, including hosting nationwide day-long seminars for employers, family members, and other stakeholders, publishing guidance on limitations on payment of a subminimum wage, including two field assistance bulletins<sup>686</sup> and one fact sheet,<sup>687</sup> updating its PowerPoint presentation used to educate stakeholders about the 14(c) program requirements, and sending compliance assistance letters to certificate holders.<sup>688</sup> Finally, the Wage and Hour Division added that it is:

Maintaining its enforcement presence even as the number of certificate holders has declined, including review of section 511 compliance in each Section 14(c) investigation, use of revocation authority where warranted, and investigation of proportionately more of this universe of employers than under any other WHD program area.<sup>689</sup>

Wage and Hour Division stated in response to Commission interrogatories that the Department of Labor has also “included the Section 14(c) regulations in its long-term regulatory reform agenda, proposing to revise the regulations implementing Section 14(c) to reflect changes in employment laws affecting workers with disabilities since the last update.”<sup>690</sup>

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<sup>683</sup> Ibid.

<sup>684</sup> Wage and Hour Division Response to USCCR Interrogatory No. 18 at 8; Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (on file).

<sup>685</sup> Wage and Hour Division Ibid.

<sup>686</sup> See, U.S. Dep’t of Labor Wage and Hour Division, Field Assistance Bulletin No. 2016-2 *WHD Enforcement of WIOA Limitations on Payment of Subminimum Wages under FLSA Section 14(c)* (July 27, 2016) [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2016\\_2.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2016_2.pdf); U.S. Dep’t of Labor Wage and Hour Division, Field Assistance Bulletin No. 2019-1 *WHD Enforcement of WIOA Limitations on Payment of Subminimum Wages under FLSA 14(c) – Section 511’s Definition of “Subminimum Wages”* (Feb. 15, 2019) [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2019\\_1.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2019_1.pdf).

<sup>687</sup> U.S. Dep’t of Labor Wage and Hour Division, Fact Sheet No. 39H, The Workforce Innovation and Opportunity Act and Limitations on Payment of Subminimum Wages under Section 14(c) of the Fair Labor Standards Act (Feb. 2019), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs39h.pdf>.

<sup>688</sup> Wage and Hour Division Response to USCCR Interrogatory No. 18 at 8.

<sup>689</sup> Ibid.

<sup>690</sup> Ibid.; See also, 29 C.F.R. § 525 *et seq.*

The Wage and Hour Division also reported a number of compliance initiatives aimed at achieving compliance before a violation occurs. The Division stated that over the past eight years, it has conducted full day training seminars for certificate holders, advocates, and workers on how to maintain compliance with 14(c) requirements.<sup>691</sup> These outreach efforts have a target audience of employers, employer representatives, human resources professionals, and employer associations.<sup>692</sup> The Wage and Hour Division stated that it also employs Community Outreach and Resource Planning Specialists in nearly all of its district offices to assist in the Division's efforts to interact with the regulated community and stakeholders.<sup>693</sup> The Wage and Hour Division has developed online calculators which aim to assist 14(c) certificate holders in maintaining compliance by helping to calculate a commensurate wage and a prevailing wage.<sup>694</sup>

In response to Commission interrogatories, the Wage and Hour Division also stated that it has developed and published three information cards relating to the Section 14(c) program.<sup>695</sup> One is a card that explains the basic worker rights and program requirements.<sup>696</sup> The second is a referral card that provides workers with basic information about the Section 14(c) program and how to contact the Wage and Hour Division if they have questions or concerns.<sup>697</sup> The third card is about the provisions of Executive Order 13,658 that sets a minimum wage for many federal construction and service contracts.<sup>698</sup> These cards are designed for workers with disabilities and their family members to provide information on their rights under Section 14(c) of the Fair Labor Standards Act and Executive Order 13,658, and how to contact the Wage and Hour Division with concerns.<sup>699</sup>

In 2016, the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities issued a Final Report that contained recommendations for the

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<sup>691</sup> Zeigler Statement, *Subminimum Wages Briefing*, at 5.

<sup>692</sup> *Ibid.*, 4.

<sup>693</sup> *Ibid.*

<sup>694</sup> U.S. Dep't of Labor Wage and Hour Division, FLSA Section 14(c) Calculators, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/calculators> (last accessed Feb. 12, 2020).

<sup>695</sup> *See generally*, Wage and Hour Division Response to USCCR Interrogatory No. 22 at 12-13.

<sup>696</sup> *Ibid.*

<sup>697</sup> *Ibid.*

<sup>698</sup> *Ibid.*

<sup>699</sup> *Ibid*; *See*, U.S. Dep't of Labor, *Rights for Workers with Disabilities Section 14(c) and Subminimum Wage Employment* (Aug. 2015) <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/RightsForWorkersWithDisabilities.pdf>; U.S. Dep't of Labor, *Section 14(c) and Subminimum Wage Employment*, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH1017.pdf>; U.S. Dep't of Labor, *Minimum Wage Protections for Federal Contract Workers* (2010) <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH1525.pdf>.

Department of Labor regarding administration of the 14(c) program.<sup>700</sup> According to the Wage and Hour Division's response to the Commission's interrogatories, some of the Committee's recommendations have been implemented by the Department of Labor's Office of Disability Employment Policy.<sup>701</sup> The Department of Labor stated that the Office of Disability Employment Policy has implemented the Advisory Committee recommendations in several ways, such as "identifying states and state programs that are currently most effective in delivering services resulting in [competitive integrated employment] outcomes for people with significant disabilities"; "providing technical assistance to the states through internal federal agency expertise" through its Visionary Opportunities to Increase Competitive-Integrated Employment initiative; "studying and providing support for the study of impacts on employment for all people with significant disabilities"; and "participating as a member of an interagency task force to develop an implementation plan for capacity-building steps for increasing CIE and advancing economic self-sufficiency."<sup>702</sup>

In addition to recommendations applicable to the Office of Disability Employment Policy, the Advisory Committee also made recommendations about the 14(c) certificate program that apply to the Wage and Hour Division. One of the main recommendations was that the Wage and Hour Division impose stricter standards on the issuance or renewal of any 14(c) certificates.<sup>703</sup> The stricter standards suggested by the Advisory Committee's Final Report include that the Wage and Hour Division should require a state to provide evidence that there is a current lack of employment opportunities within the state for people with disabilities, and that 14(c) certificate applicants provide information that their certificate is "necessary to prevent the curtailment of opportunities for employment"<sup>704</sup> for people with disabilities in the region they serve, and the applicant must detail steps it would take to assist people with disabilities in obtaining competitive integrated employment.<sup>705</sup> Finally, the Advisory Committee recommended that the Wage and Hour Division work with federal partners to evaluate information about employment opportunities for people with disabilities.<sup>706</sup>

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<sup>700</sup> Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities (Sept. 15, 2016).

<sup>701</sup> Wage and Hour Division Response to USCCR Interrogatory No. 30 at pp. 18-19.

<sup>702</sup> Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (on file); See, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, *Final Report*, (Sept. 15, 2016) [https://www.dol.gov/odep/topics/pdf/ACICIEID\\_Final\\_Report\\_9-8-16.pdf](https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf).

<sup>703</sup> 29 U.S.C. § 214(a).

<sup>704</sup> 29 U.S.C. § 214(a).

<sup>705</sup> Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at 30 (Sept. 15, 2016).

<sup>706</sup> *Ibid.*



In response to the Advisory Committee recommendations, the Wage and Hour Division stated that it began pursuing a number of strategies to ensure the 14(c) certificate program is being used only where necessary to prevent the curtailment of employment opportunities.<sup>707</sup> The Wage and Hour Division issued guidance explaining the impact of the then-new requirements under the Workforce Innovation and Opportunity Act for Section 14(c) certificate holders.<sup>708</sup> The Division stated that it had also begun changes to the 14(c) certificate application forms and instructions to shift focus towards collecting more individual employee data,<sup>709</sup> and had issued an Administrator's Interpretation explaining the impact of a state law prohibiting the payment of a subminimum wage on Section 14(c) certificate holders and its impact on the issuance of such certificates.<sup>710</sup>

The Wage and Hour Division stated that it updated its process for revoking Section 14(c) certificates of employers whose practices result in serious violations and issued a letter to all certificate holders to advise them that issues that might warrant revocation of their certificate include misrepresentations or false statements made in obtaining a certificate or in permitting a worker with a disability to be employed under the 14(c) certificate; violations of any of the provisions of the Fair Labor Standards Act or the terms of the certificate; or that the certificate is no longer necessary in order to prevent the curtailment of opportunities for employment.<sup>711</sup>

## Department of Justice

The role of the Civil Rights Division of the Department of Justice includes enforcing our nation's civil rights laws, such as the Americans with Disabilities Act and Section 504 of the Rehabilitation Act through litigation, as well as providing coordination among federal agencies and technical

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<sup>707</sup> Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (on file).

<sup>708</sup> See, U.S. Dep't of Labor Wage and Hour Division, Field Assistance Bulletin No. 2016-2: WHD Enforcement of WIOA Limitations on Payment of Subminimum Wages under FLSA Section 14(c), (July 27, 2016) [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2016\\_2.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2016_2.pdf).

<sup>709</sup> Wage and Hour Division, Response to USCCR Affected Agency Review (May 19, 2020) (on file).

<sup>710</sup> See, U.S. Dep't of Labor 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/FLSAAI2016\\_2.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FLSAAI2016_2.pdf).

<sup>711</sup> See, U.S. Dep't of Labor Wage and Hour Division, *Letter to Current 14(c) Certificate Holders Concerning the General Revocation Process* (Mar. 21, 2016) <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/1414cLetter.pdf>.

assistance, including regulations and policy guidance.<sup>712</sup> All of these activities are key components to effective civil rights enforcement.<sup>713</sup>

*Guidance and Technical Assistance Regarding the ADA Integration Mandate & Informed Choice*

In 2011, the Department of Justice issued a statement regarding the integration mandate contained in Title II of the ADA in which, in part, the Department explained the requirements for informed consent or choice. As discussed in Chapter 1, one of the issues that may apply to 14(c) employers that are public or receive federal funding is whether they are segregated or integrated. The ADA’s “integration mandate” also applies to other public entities providing “services” to persons with disabilities.<sup>714</sup> In its 2011 statement, the Department of Justice clarified that:

Individuals must be provided the opportunity to make an informed decision. Individuals who have been institutionalized and segregated have often been repeatedly told that they are not capable of successful community living and have been given very little information, if any, about how they could successfully live in integrated settings. As a result, individuals’ and their families’ initial response when offered integrated options may be reluctance or hesitancy. Public entities must take affirmative steps to remedy this history of segregation and prejudice in order to ensure that individuals have an opportunity to make an informed choice. Such steps include providing information about the benefits of integrated settings; facilitating visits or other experiences in such settings; and offering opportunities to meet with other individuals with disabilities who are living, working and receiving services in integrated settings, with their families, and with community providers. Public entities also must make reasonable efforts to identify and addresses any concerns or objections raised by the individual or another relevant decision-maker.<sup>715</sup>

The Department of Justice explained that merely asking a person with a disability (or the person’s parent or guardian) whether he or she opposes an integrated setting is not sufficient to achieve the requirement of informed consent to stay in a non-integrated setting.<sup>716</sup>

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<sup>712</sup> See U.S. Commission on Civil Rights, *Are Rights a Reality? Federal Civil Rights Enforcement*, Nov. 2019, pp. 67-156; See also U.S. Dep’t of Justice, Justice Manual, Enforcement of Civil Rights Statutes, § 8 – 2.400, Disability Rights Section, <https://www.justice.gov/jm/jm-8-2000-enforcement-civil-rights-civil-statutes#8-2.400> [hereinafter Justice Manual].

<sup>713</sup> See U.S. Commission on Civil Rights, *Are Rights a Reality? Federal Civil Rights Enforcement*, Nov. 2019, pp. 15-63, <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf>.

<sup>714</sup> See *supra* notes 191-199.

<sup>715</sup> U.S. Dep’t of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, Questions and Answers, 5 (June 2011) [https://www.ada.gov/olmstead/q&a\\_olmstead.htm](https://www.ada.gov/olmstead/q&a_olmstead.htm).

<sup>716</sup> *Id.* at 4-5.

According to Ruby Moore, Executive Director of the Georgia Advocacy Office, and Professor Mark Friedman of City University of New York in their article in the *Journal of Vocational Rehabilitation*, true informed choice requires “a meaningful decision between multiple, *significantly distinguishable* viable options. Choice incorporates the importance of autonomy, control, self-determination, and having a variety of options to choose from.”<sup>717</sup> Moore and Friedman also assert that informed choice is not meant to support continued segregation of people with disabilities.<sup>718</sup> Rather, informed choice requires Community Rehabilitation Programs and state agencies to affirmatively work together to ensure that individuals with disabilities are offered informed choices about all of their employment options.<sup>719</sup> Moreover, under the Fair Labor Standards Act as applicable to all 14(c) certificate holders (whether public or private entities), individuals with disabilities must receive “career counseling, and information and referrals . . . delivered in a manner that facilitates independent decisionmaking and informed choice, as the individual makes decisions regarding employment and career advancement.”<sup>720</sup> 14(c) employees must also receive information by the employer about “self-advocacy, self-determination, and peer mentoring training opportunities available in the individual’s geographic area, provided by an entity that does not have any financial interest in the individual’s employment outcome” at least once every six months during their first year of employment at a subminimum wage by a 14(c) certificate holding entity, and at least once every year thereafter.<sup>721</sup> Moore also provided testimony to the Commission highlighting that for younger people with disabilities, informed choice and the expectation of competitive integrated employment may already be the expected outcome in their transition from school to work due to changes in state policies for students with disabilities.<sup>722</sup>

The Department of Justice advised that public entities must take further steps to ensure that individuals with disabilities have informed choices, such as providing information on the benefits of integrated settings, facilitating visits or other experiences in integrated settings, and offering opportunities to meet with other individuals with disabilities who are living, working and receiving services in integrated settings, with their families, and with community providers.<sup>723</sup>

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<sup>717</sup> Moore, Ruby and Friedman, Mark. “The role of informed choice in advancing competitive integrated employment.” *Journal of Vocational Rehabilitation* 46 (2017): 248 (emphasis in original).

<sup>718</sup> *Ibid.*, 254.

<sup>719</sup> *Ibid.*

<sup>720</sup> 29 U.S.C. § 794g(c)(1)(A).

<sup>721</sup> 29 U.S.C. § 794g(c)(1)(B).

<sup>722</sup> Moore Statement, at 3.

<sup>723</sup> U.S. Dep’t of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* at 4-5 (June 2011)

[https://www.ada.gov/olmstead/q&a\\_olmstead.htm#pdf](https://www.ada.gov/olmstead/q&a_olmstead.htm#pdf).

The concept of informed choice related to employment of people with disabilities first appeared in federal legislation in the 1992 amendments to the Rehabilitation Act of 1973.<sup>724</sup> There, Congress made clear in federal law that individuals with disabilities should be able to make an informed choice regarding *inter alia* their employment prospects.<sup>725</sup>

In a decision certifying the class for a class action suit brought by people with disabilities who work in or who have been referred to sheltered workshops, a federal district court explained one of the challenges of ensuring that people with disabilities have informed choice as follows:

Due to their disability, many individuals with [intellectual or developmental disabilities] may not ask for supported employment services because they are not aware of them or because they are not aware that they have any choices as to services that they are entitled to receive.<sup>726</sup>

In his testimony at the Commission’s briefing, Neil Romano, Chair of the National Council on Disability, emphasized the importance of people with disabilities having choice in their employment, stating that:

The belief that someone would choose to make less money for their work is, in and of itself, a demonstration of how certificate holders do not believe that people with disabilities are whole people capable of making even the most basic decisions beneficial to themselves. . . . since the 1930s, society and people with disabilities have come to expect far more out of their lives than past public policies allowed. Today we have different words for the opportunity to work for pennies an hour, words like discrimination and exploitation.<sup>727</sup>

In addition to its 2011 statement, in 2016, the Department of Justice (DOJ) issued guidance on the application of Title II of the ADA and *Olmstead* in various settings, including with regard to employment.<sup>728</sup> DOJ summarized the applicable statutory and regulatory provisions as follows:

[T]he ADA and its Title II regulations require public entities to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified

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<sup>724</sup> 29 U.S.C. § 701(c)(1) (as amended by the Rehabilitation Act Amendments of 1992, Pub. L. 102-569, 106 Stat. 4347 (Oct. 1992)) (“It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles of-- respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities”).

<sup>725</sup> *Id.*

<sup>726</sup> *Lane v. Kitzhaber*, 283 F.R.D. 587, 600 (D. Or. 2012).

<sup>727</sup> Romano Testimony, *Subminimum Wages Briefing*, pp. 32-33.

<sup>728</sup> U.S. Dep’t of Justice, Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C. to State and Local Governments’ Employment Services Systems for Individuals with Disabilities* (Oct. 31, 2016), [http://iel.org/sites/default/files/DOJOlmstead\\_Guidance\\_Employment.pdf](http://iel.org/sites/default/files/DOJOlmstead_Guidance_Employment.pdf).

individuals with disabilities.” The preamble to the “integration mandate” regulation explains that “the most integrated setting” is one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible[.]”<sup>729</sup>

However, in 2017, DOJ rescinded the 2016 *Olmstead* guidance regarding the applicability of the ADA integration mandate to state and local employment services systems for people with disabilities, and the Department of Justice has not replaced the rescinded guidance with alternative guidance.<sup>730</sup> In 2002, the Commission explained, “[t]he lack of updated and clear policy guidance, and the inadequate resources devoted to it, are among the primary reasons for poor civil rights enforcement.”<sup>731</sup> In 2019, the Commission specifically examined the impact of the 2016 *Olmstead* guidance, writing that:

The value of this guidance was shown by it being complemented by enforcement actions as well as interaction and coordination with other agencies. After the *Olmstead* decision, [DOJ Civil Rights Division] brought two cases against states for ADA violations over non-integrative and discriminatory employment practices, procuring a consent decree in Rhode Island in 2014, and after [DOJ Civil Rights Division] intervention in a private case, a court-approved settlement agreement in Oregon in 2015. In January 2015, [DOJ Civil Rights Division] led an Advisory Committee on Increasing Competitive Integrated Employment for Individuals With Disabilities, based on the DOJ’s *Olmstead* enforcement and the Obama Administration’s prioritization of this issue. Based on these cases as well as the underlying law discussed above, in 2016, [DOJ Civil Rights Division] took the position that the ADA integration mandate required that public entity workshops had to make sufficient opportunity for qualified individuals with disabilities to work in integrated settings, where they would receive wages the same as non-disabled workers.<sup>732</sup>

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<sup>729</sup> Dep’t of Justice, Civil Rights Division, Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C. to State and Local Governments’ Employment Service Systems for Individuals with Disabilities*, 2 (Oct. 31, 2016) [hereinafter *Olmstead Guidance*], [https://drive.google.com/file/d/1I1dw0deRAhqu4Tt0AwJcAo\\_Hqz2J3Nfz/viewhttps://www.ada.gov/olmstead/q&a\\_olmstead.htm](https://drive.google.com/file/d/1I1dw0deRAhqu4Tt0AwJcAo_Hqz2J3Nfz/viewhttps://www.ada.gov/olmstead/q&a_olmstead.htm).

<sup>730</sup> See U.S. Commission on Civil Rights, *Are Rights Reality? Federal Civil Rights Enforcement*, Nov. 2019, pp. 139-140; U.S. Dep’t of Justice, *Attorney General Jeff Sessions Rescinds 25 Guidance Documents* (Dec. 21, 2017) <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>; U.S. Dep’t of Justice, *Withdrawal of the Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C. to State and Local Governments’ Employment Service Systems for Individuals with Disabilities* (Dec. 21, 2017) [https://www.ada.gov/withdrawn\\_olmstead.html](https://www.ada.gov/withdrawn_olmstead.html).

<sup>731</sup> U.S. Comm’n on Civil Rights, *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume One: A Blueprint for Civil Rights Enforcement*, p. 3 (2002) <http://www2.law.umaryland.edu/marshall/usccr/documents/tenyrcheckupvol1.pdf>.

<sup>732</sup> U.S. Commission on Civil Rights, *Are Rights Reality? Federal Civil Rights Enforcement*, Nov. 2019, pp. 140-141, <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf> (internal citations omitted).

Alison Barkoff also emphasized in her testimony that, despite the rescission of federal guidance, there is a “framework” for state and local governments to comply with laws that seek to promote competitive integrated employment for youth with disabilities and end the school-to-sheltered workshop pipeline, but that the laws are “not fully being enforced at this point” and that the federal government has “backed away” from offering technical assistance and guidance in recent years.<sup>733</sup>

### *Investigations and Litigation*

The Wage and Hour Division of the Department of Labor may refer cases involving civil rights issues to DOJ.<sup>734</sup> DOJ has some jurisdictional overlap with the Equal Employment Opportunity Commission (EEOC), which also has the authority to enforce provisions of the ADA.<sup>735</sup> Within the DOJ Civil Rights Division, both the Disability Rights Section and the Special Litigation Section would have jurisdiction over alleged civil rights violations related to 14(c) certificate holders.

DOJ’s Disability Rights and Special Litigation Sections of the Civil Rights Division led the litigation that established the Supreme Court precedent in the *Olmstead* case, which clarified that the “integration mandate” of Title II of the ADA requires that public entities provide community-based services to persons with disabilities when appropriate, when agreed to by these individuals, and when reasonable accommodations can be made.<sup>736</sup> As discussed in Chapter 1, public entities have a statutory obligation not to otherwise discriminate against people on the basis of disability.<sup>737</sup> Title I of the ADA prohibits discrimination against people with disabilities in employment,; however, DOJ litigation has centered on enforcement of Title II of the ADA which includes the integration mandate prohibiting discrimination against people with disabilities through segregation.<sup>738</sup>

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<sup>733</sup> Ibid., pp. 47-49.

<sup>734</sup> See *supra* notes 651-654.

<sup>735</sup> See *infra*, Notes 760-765.

<sup>736</sup> *Olmstead*, 527 U.S. at 607.

<sup>737</sup> See *supra* notes 180-188 (discussing Title I of the ADA as well as 28 C.F.R. § 35.130(b)(1)(vii)).

<sup>738</sup> See *supra*, notes 183-190.

As discussed in Chapter 1,<sup>739</sup> DOJ involvement in litigation to enforce the ADA's integration mandate resulted in consent decrees in the states of Oregon (2013)<sup>740</sup> and Rhode Island (2014)<sup>741</sup> that sought to correct the states' overreliance on segregated workshops under 14(c) certificates. The remedies that DOJ was able to obtain, including federal court oversight and requiring the phasing out of sheltered workshops in those two states, surpass those available to the Department of Labor, as DOJ has the authority to enforce the ADA in court.<sup>742</sup> In the *Lane* settlement agreement the federal court entered, the state of Oregon agreed to end sheltered workshop placements for any youth entering work or adult receiving employment services from the state of Oregon, but not already employed in a sheltered workshop.<sup>743</sup> Additionally, Oregon agreed to reduce the population of employees with disabilities working in sheltered workshops by 2017.<sup>744</sup> Similarly, the consent decree in *United States v. Rhode Island* required the state to end funding for new entrants into sheltered workshops in 2013.<sup>745</sup> Both resolved findings of violations of Title II of the ADA and the Supreme Court's *Olmstead* decision.<sup>746</sup>

As the Commission documented in 2019, the Disability Rights Section of the Civil Rights Division has brought subsequent cases to enforce the Americans with Disabilities Act in recent

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<sup>739</sup> See *supra*, notes 204-217.

<sup>740</sup> See, Settlement Agreement, *Lane v. Brown*, No. 3:12-cv-00138 §§ IV – V (D. Ore. 2013), [https://www.ada.gov/olmstead/documents/lane\\_sa.pdf](https://www.ada.gov/olmstead/documents/lane_sa.pdf).

<sup>741</sup> See 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>; 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>.

<sup>742</sup> See, Settlement Agreement, *Lane v. Brown*, No. 3:12-cv-00138 §§ IV – V (D. Ore. 2013), [https://www.ada.gov/olmstead/documents/lane\\_sa.pdf](https://www.ada.gov/olmstead/documents/lane_sa.pdf); 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>.<sup>743</sup> Settlement Agreement, *Lane v. Brown*, No. 3:12-cv-00138 §§ IV – V (D. Ore. 2013), [https://www.ada.gov/olmstead/documents/lane\\_sa.pdf](https://www.ada.gov/olmstead/documents/lane_sa.pdf).

<sup>743</sup> Settlement Agreement, *Lane v. Brown*, No. 3:12-cv-00138 §§ IV – V (D. Ore. 2013), [https://www.ada.gov/olmstead/documents/lane\\_sa.pdf](https://www.ada.gov/olmstead/documents/lane_sa.pdf).

<sup>744</sup> *Id.*

<sup>745</sup> See, Consent Decree, *United States v. Rhode Island*, CA 14-174, § IV (D. R.I., Apr. 9, 2014), <https://www.ada.gov/olmstead/documents/ri-olmstead-statewide-agreement.pdf>; Interim Settlement Agreement, *United States v. Rhode Island and City of Providence*, 1:13-cv-00442 (D. R.I. 2013) <https://www.ada.gov/olmstead/documents/ri-providence-interim-settlement.pdf>.

<sup>746</sup> *Id.*, at § I; See Settlement Agreement, *Lane v. Brown*, No. 3:12-cv-00138 (D. Ore. 2013), [https://www.ada.gov/olmstead/documents/lane\\_sa.pdf](https://www.ada.gov/olmstead/documents/lane_sa.pdf).

years.<sup>747</sup> However, unlike the Oregon and Rhode Island cases, those cases have not involved Section 14(c) certificate holders.<sup>748</sup>

In September 2019, DOJ and the City of Providence filed a joint motion to dismiss the case of *United States v. Rhode Island and the City of Providence* as to the City,<sup>749</sup> and the federal judge in the case issued an order to dismiss after determining that the City was in compliance with the interim settlement agreement and consent decree overseen by the court.<sup>750</sup> Notably, the parties did not move for the court to dismiss the case against the State of Rhode Island, so as of this writing, the interim settlement agreement and consent decree remain in effect against the State.<sup>751</sup> In September 2019, the court agreed to terminate the interim settlement agreement with the City, which had required the City to provide supports and services to students with disabilities necessary to introduce them to work in integrated settings, engage in person-centered planning with each student to identify post-secondary education work in integrated settings, and offer options for post-secondary supported employment and integrated day services.<sup>752</sup> The City was required to close its sheltered workshop and to offer benefits counseling to all students with intellectual/developmental disabilities.<sup>753</sup> In August 2019, the court-appointed independent monitor determined that the City was in substantial compliance with the terms of the interim settlement agreement, including implementing integrated trial work programs for students with disabilities and engaging in person-centered career development planning to encourage work

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<sup>747</sup> See, U.S. Comm'n on Civil Rights, *Are Rights A Reality? Evaluating Federal Civil Rights Enforcement*, pp. 103, 110-11 (Oct. 2019) <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf>.

<sup>748</sup> *Ibid.*, Appendix A (documenting all Civil Rights Division cases brought, by section); See also U.S. Dep't of Justice, Civil Rights Division, Cases and Matters, Disability, linking ADA.gov; [https://www.ada.gov/enforce\\_current.htm](https://www.ada.gov/enforce_current.htm).

<sup>749</sup> Joint Motion to Dismiss, *United States v. Rhode Island and Providence*, 1:13-cv-00442 (D. R.I., Sept. 5, 2019) [https://www.ada.gov/olmstead/documents/ri\\_joint\\_motion.html](https://www.ada.gov/olmstead/documents/ri_joint_motion.html).

<sup>750</sup> Minute Entry, *United States v. Rhode Island and Providence*, 1:13-cv-00442 (D. R.I. entered Sept. 26, 2019) [https://www.ada.gov/olmstead/documents/ri\\_order.html](https://www.ada.gov/olmstead/documents/ri_order.html); See also, Memorandum in Support of Parties' Joint Motion to Dismiss, *United States v. Rhode Island and Providence*, CA 13-442, (D. R.I. filed Sept. 26, 2019), [https://www.ada.gov/olmstead/documents/ri\\_motion\\_dismiss\\_memo.html](https://www.ada.gov/olmstead/documents/ri_motion_dismiss_memo.html); U.S. Dep't of Justice, *Federal Court Terminates Agreement After the City of Providence Transforms Services for Students with Disabilities at Providence Public High School*, (Sept. 26, 2019), <https://www.justice.gov/opa/pr/federal-court-terminates-agreement-after-city-providence-transforms-services-students>.

<sup>751</sup> Memorandum in Support of Parties' Joint Motion to Dismiss, *United States v. Rhode Island and Providence*, CA 13-442, Note 1, (D. R.I. filed Sept. 26, 2019), [https://www.ada.gov/olmstead/documents/ri\\_motion\\_dismiss\\_memo.html](https://www.ada.gov/olmstead/documents/ri_motion_dismiss_memo.html).

<sup>752</sup> Interim Settlement Agreement, *United States v. Rhode Island and City of Providence*, 1:13-cv-00442, § IV (D. R.I. 2013) <https://www.ada.gov/olmstead/documents/ri-providence-interim-settlement.pdf>.

<sup>753</sup> *Id.*



placements in integrated settings.<sup>754</sup> The court monitor found that all students with intellectual/developmental disabilities received person centered career development planning beginning at age 14, and that students will receive “meaningful options for post-secondary Supported Employment and Integrated Day Services beginning no later than the start of the school year in which they will turn 18.”<sup>755</sup> The monitor found that the City had closed its sheltered workshop as of April 12, 2013,<sup>756</sup> and found that between November 2017 and February 2019, the City provided 100 percent of students with intellectual/developmental disabilities with supported employment services.<sup>757</sup> Responsibility for securing job placements in integrated settings was shifted to the State of Rhode Island, so the court monitor did not find whether the City was securing integrated job placements for former students.<sup>758</sup>

Commission research shows that DOJ has not been active in filing new *Olmstead* enforcement actions regarding 14(c) since the *Rhode Island* case in 2013.<sup>759</sup>

### Equal Employment Opportunity Commission (EEOC)

As discussed in Chapter 1, in 2012, EEOC enforced Title I the ADA against a private employer in the *Hill Country Farms* case, and won a \$240 million jury award for damages, as well as over \$1 million in back pay, for persons with disabilities who had been misclassified and underpaid by a former 14(c) workshop.<sup>760</sup> This judgment came about several years after the employer ended its use of a 14(c) certificate.<sup>761</sup> Although the case seems to be rare as the Commission has not located similar cases, this case shows that while states may be immune to damages under Section I of the ADA, private employers are not.<sup>762</sup> Further, while either EEOC or DOJ may litigate Title I claims

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<sup>754</sup> Court Monitor's Final Report on the City of Providence Public School District's Substantial Compliance with the Interim Settlement Agreement, *United States v. Rhode Island and Providence*, 1:13-cv-00442 (D. R.I., Aug. 20, 2019); see, Interim Settlement Agreement, *United States v. Rhode Island and City of Providence*, 1:13-cv-00442, § IV (D. R.I. 2013) <https://www.ada.gov/olmstead/documents/ri-providence-interim-settlement.pdf>.

<sup>755</sup> *Id.* at 14.

<sup>756</sup> *Id.* at 15.

<sup>757</sup> *Id.* at 20.

<sup>758</sup> *Id.* at 22.

<sup>759</sup> See generally, U.S. Dep't of Justice Civil Rights Division, *Olmstead Enforcement - Cases by Issue*, [https://www.ada.gov/olmstead/olmstead\\_cases\\_by\\_issue.htm#sheltered-workshops](https://www.ada.gov/olmstead/olmstead_cases_by_issue.htm#sheltered-workshops) (last accessed May 22, 2020).

<sup>760</sup> See *supra* notes 234-240 (discussing *E.E.O.C. v. Hill Country Farms*, 899 F. Supp. 2d 827 (S.D. Iowa 2012), *aff'd* 564 Fed.Appx. 868 (Mem) (8<sup>th</sup> Cir. 2014)).

<sup>761</sup> See *supra* notes 239-240.

<sup>762</sup> *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 360 (2001).

against state and local employers, EEOC retains Title I matters for litigation that involve private employers.<sup>763</sup>

Aside from the *Hill Country Farms* case with its multi-million dollar award, a Westlaw and LexisNexis legal database search revealed that there are no known similar cases in which EEOC enforced ADA protections on behalf of workers with disabilities working in 14(c) workshops.<sup>764</sup> EEOC charge data on its ADA enforcement action statistics do not report whether private employers are 14(c) certificate holders,<sup>765</sup> so it is difficult to determine whether any of these thousands of private complaints received by EEOC involved 14(c) workshops.

### **Centers for Medicare & Medicaid Services – Department of Health and Human Services: Home and Community Based Settings Rule**

The Department of Health and Human Services' Centers for Medicare & Medicaid Services plays a pivotal role in the provision of services to people with disabilities, including employment supports and services. States are able to use Medicaid dollars to offer employment supports to people with intellectual and developmental disabilities through Section 1915(c)<sup>766</sup> waivers or Section 1915(i) state-plan services.<sup>767</sup> Section 1915(c) waivers permit states to spend money providing support for individuals in integrated settings who would otherwise receive services in an institutionalized setting.<sup>768</sup> Section 1915(i) services provide home and community based services to individuals who meet state-defined criteria.<sup>769</sup> In written testimony to the Commission, Dr. Julie Christensen, Director of Policy and Advocacy at the Association of People Supporting Employment First, explains that:

Medicaid [Home and Community Based] services are intended to lead to integrated community employment - or competitive, integrated employment as defined in the Workforce Innovation and Opportunity Act (WIOA). However, in direct violation of the rights of people with disabilities, this transition often does not happen. It is not uncommon

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<sup>763</sup> See *supra* note 712, citing Justice Manual § 8 – 2.400.

<sup>764</sup> See, e.g., Westlaw.com; LexisNexis.com.

<sup>765</sup> See U.S. Equal Employment Opportunity Commission, Enforcement and Litigation Statistics, *ADA Charge Data by Impairments/Bases – Receipts (Charges filed with EEOC) FY 1997 – FY 2019*, <https://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm>.

<sup>766</sup> 42 U.S.C. § 1396n(c).

<sup>767</sup> 42 U.S.C. § 1396n(i).

<sup>768</sup> 42 U.S.C. § 1396n(c).

<sup>769</sup> 42 U.S.C. § 1396n(i).

to find individuals in these prevocational programs who have been receiving services in that setting for decades.<sup>770</sup>

Christensen also notes that according to guidance from the Centers for Medicare and Medicaid Services, prevocational services should be time limited, not long-term employment solutions for people with disabilities during which they can be paid a subminimum wage.<sup>771</sup> Furthermore, Christensen writes in her testimony that:

Simply transitioning on to another [Home and Community Based Services] employment service does not necessarily equate to having solved the issue of subminimum wage for people with disabilities. When a state is approved to offer Group Supported Employment under their Medicaid [Home and Community Based Services] waiver, the regulations are silent on wages. This creates a loophole through which employers or providers can continue to pay a productivity wage to individuals who are not otherwise eligible for prevocational services under Medicaid.<sup>772</sup>

Many individuals with disabilities rely on Medicaid funding not only for their healthcare, but also to cover expenses incurred by day and employment services.<sup>773</sup> Medicaid contributes some of the funding for these services, but funds are controlled and administered by state agencies and services are frequently provided by community providers, including Community Rehabilitation Programs holding a 14(c) certificate and providing employment services.<sup>774</sup> Medicaid is also the primary funding source of employment services through Home and Community Based Settings waivers granted to states.<sup>775</sup> Day and employment services are funded through Home and Community Based Services Waivers issued to states by the Centers for Medicare and Medicaid Services.<sup>776</sup>

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<sup>770</sup> Christensen Statement, at 3.

<sup>771</sup> Ibid; U.S. Dep't of Health and Human Services Centers for Medicare & Medicaid Services, CMSC Informational Bulletin, *Updates to the §1915 (c) Waiver Instructions and Technical Guide regarding employment and employment related services* (Sept. 16, 2011) <https://downloads.cms.gov/cmsgov/archived/downloads/CMCSBulletins/downloads/CIB-9-16-11.pdf>.

<sup>772</sup> Christensen Statement, at 3.

<sup>773</sup> 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 5, [https://www.thinkwork.org/sites/default/files/files/statedata2018\\_web\\_F.pdf](https://www.thinkwork.org/sites/default/files/files/statedata2018_web_F.pdf).

<sup>774</sup> Ibid., 4.

<sup>775</sup> John Butterworth, Supplemental Testimony to USCCR at 1.

<sup>776</sup> 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 5, [https://www.thinkwork.org/sites/default/files/files/statedata2018\\_web\\_F.pdf](https://www.thinkwork.org/sites/default/files/files/statedata2018_web_F.pdf).

Day services for people with disabilities are jointly funded through Medicaid and state agencies that support people with intellectual and developmental disabilities.<sup>777</sup>

At the Commission’s November 2019 briefing, several panelists testified to the importance of Medicaid funding to ensuring that people with disabilities receive employment supports and services. Alison Barkoff of the Center for Public Representation explained that Medicaid dollars go towards “supported employment to help people work in competitive integrated employment, as well as what’s called pre-vocational services in sheltered workshops.”<sup>778</sup> Barkoff further explained that the Centers for Medicare & Medicaid Services issued the Home and Community Based Services rule in 2014, which in part requires that all people receiving services under a Home and Community Based Services waiver have the opportunity to work in community integrated employment.<sup>779</sup>

Former Governor of Pennsylvania and Homeland Security Secretary during the George W. Bush Administration Tom Ridge testified before the Commission in his capacity as Chairman of the National Organization on Disability, providing the Commission with an example of how Home and Community Based Services waivers can be used in practice, as follows:

At [the National Organization on Disability], we love our executive director, Carol Glazer, and her son Jacob, severely disabled. But he has meaningful part-time employment. Thanks to a person-centered planning model, Jacob works part-time, above minimum wage, at the NBA store in New York City. Medicaid pays for his job coach in the store. He also volunteers in integrated settings the rest of his time, takes weekly classes in art, music, cooking, fitness, self-improvement.<sup>780</sup>

Ridge noted in his testimony to the Commission that “[the National Organization on Disability is] focused on a bipartisan agenda to bring more workers with disabilities into the competitive labor market with fair wages.”<sup>781</sup> Ridge further testified that he believes that the federal government should ensure that there are sufficient Medicaid dollars to fund supported employment services to give all people with disabilities the opportunity to work in competitive integrated employment.<sup>782</sup>

Julie Christensen clarified in her testimony to the Commission that when Medicaid dollars are involved, employment services provided to people with disabilities must be integrated and the

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<sup>777</sup> Ibid., 4.

<sup>778</sup> Barkoff Testimony, *Subminimum Wages Briefing*, p. 42.

<sup>779</sup> Barkoff Testimony, *Subminimum Wages Briefing*, pp. 42-43.

<sup>780</sup> Ridge Testimony, *Subminimum Wages Briefing*, pp. 184-185.

<sup>781</sup> Tom Ridge, Chairman, National Organization on Disability, Written Statement for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights, Nov. 15, 2019, at 1.

<sup>782</sup> Ridge Testimony, *Subminimum Wages Briefing* p. 190.

ability to earn a full wage must be the goal.<sup>783</sup> During the open public comment session that directly followed the Commission's briefing, Charlotte Woodward, a sociology student at George Mason University and Community Outreach Associate at the National Down Syndrome Society, provided testimony to the Commission, emphasizing that any contemplated changes must allow people with disabilities to work at jobs in the community for a competitive wage without jeopardizing any funding for supports and services received through Medicaid.<sup>784</sup>

According to the Kaiser Family Foundation, which tracks Medicaid spending, the expenditure on home and community-based, long term care and services surpassed spending on institutional long-term care and services for the first time in 2013, and as of 2016, 57 percent of all long-term care and services spending was through Home and Community Based Services waivers.<sup>785</sup> Long-term support services can include funding for supported employment for people with disabilities.<sup>786</sup> In a fact sheet published alongside the final regulatory rule governing Home and Community Based Services Waivers, the Centers for Medicare and Medicaid Services explained that the final rule is intended to be outcome driven, maximizing the opportunity for people with disabilities to receive services in their home or in an integrated, community-based setting.<sup>787</sup>

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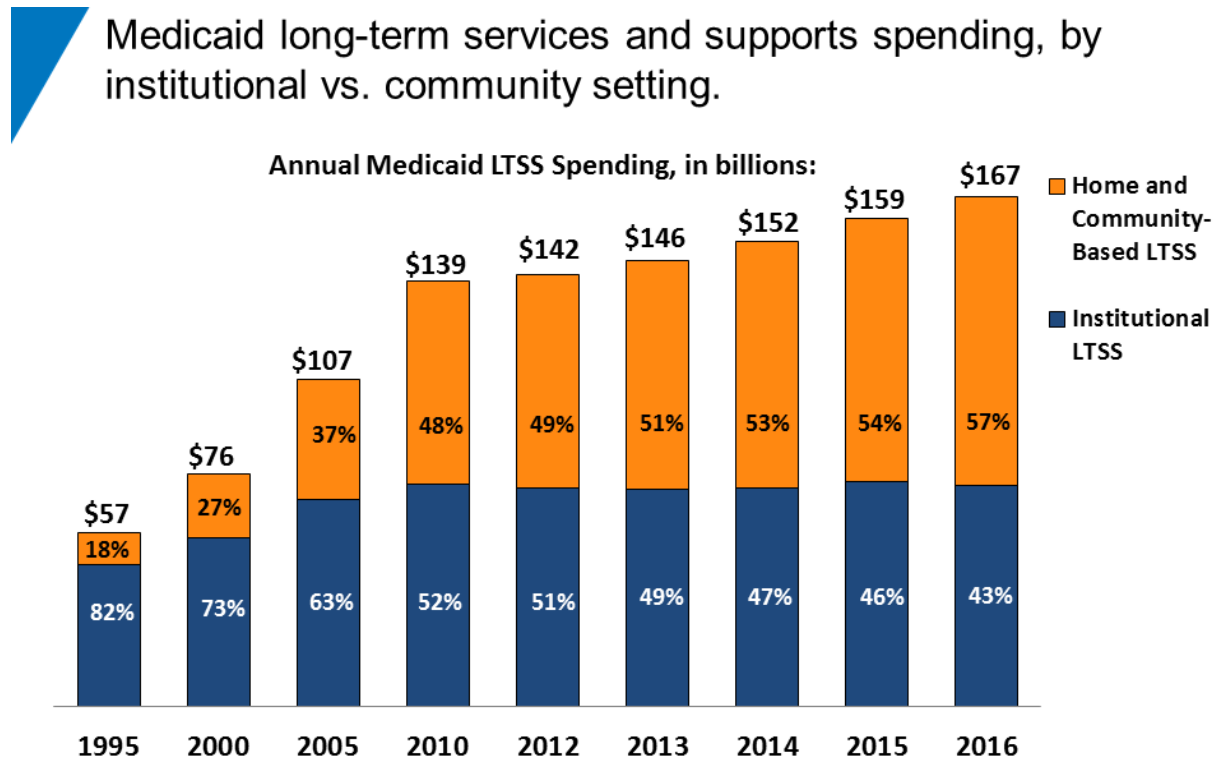
<sup>783</sup> Christensen Testimony, *Subminimum Wages Briefing*, p. 208.

<sup>784</sup> Woodward Testimony, *Subminimum Wages Briefing*, pp. 334-336.

<sup>785</sup> MaryBeth Musumeci, Priya Chidambaram, and Molly O'Malley Watts, *Issue Brief: Medicaid Home and Community-Based Services Enrollment and Spending*, Kaiser Family Foundation, p. 2 (Feb. 2020) <http://files.kff.org/attachment/Issue-Brief-Medicaid-Home-and-Community-Based-Services-Enrollment-and-Spending>.

<sup>786</sup> Erica L. Reaves and MaryBeth Musumeci, *Medicaid and Long-Term Services and Supports: A Primer*, Kaiser Family Foundation, p. 1 (Dec. 2015), <https://www.kff.org/medicaid/report/medicaid-and-long-term-services-and-supports-a-primer/>.

<sup>787</sup> Centers for Medicare and Medicaid Services, *Fact Sheet: Home and Community Based Services*, pp. 2-3 (Jan. 10, 2014) <https://www.medicare.gov/sites/default/files/2019-12/final-rule-fact-sheet.pdf>. See also 42 C.F.R. § 440.180.

**Figure 3.2: Medicaid Spending in Institutional vs. Community Settings, 1995 – 2016**

SOURCE: Steve Eiken, Kate Sredl, Brian Burwell, and Angie Amos, Medicaid Expenditures for Long-Term Services and Supports in FY 2016 (IBM Watson Health, May, 2018), <https://www.medicaid.gov/medicaid/ltss/downloads/reports-and-evaluations/ltss-expenditures2016.pdf>.



Source: Kaiser Family Foundation

The 2014 final Home and Community Based Services rule requires that all states receiving funding through a Home and Community Based Services waiver develop and adopt a transition plan that will move all services to being provided in an integrated, community environment.<sup>788</sup> After 2022, the Centers for Medicare & Medicaid Services will no longer permit the use of Home and Community Based Service waivers for supports and services in segregated settings.<sup>789</sup> By 2022, states receiving funds through Home and Community Based Service waivers must demonstrate to the Centers for Medicare and Medicaid Services that presumptively institutional settings comply with heightened standards for community integration, or the state must take action to bring institutional settings into compliance.<sup>790</sup> According to guidance issued by the Centers for Medicare and Medicaid Services, settings presumed to have the qualities of an institution include:

<sup>788</sup> 42 C.F.R. §§ 441.301, 441.710

<sup>789</sup> See, Centers for Medicare & Medicaid Services, CMS Issues New Guidance on State Implementation of Home and Community Based Services Regulation (Mar. 22, 2019) <https://www.cms.gov/newsroom/press-releases/cms-issues-new-guidance-state-implementation-home-and-community-based-services-regulation>.

<sup>790</sup> Ibid.

- Settings that are located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment;
- Settings that are in a building located on the grounds of, or immediately adjacent to, a public institution; and
- Any other settings that have the effect of isolating individuals receiving Medicaid home and community-based services (HCBS) from the broader community of individuals not receiving Medicaid [Home and Community Based Services].<sup>791</sup>

Centers for Medicare and Medicaid Services states that it will take into account, when evaluating settings, whether individuals receiving services in the setting have opportunities for interaction in and with the broader community, whether the setting restricts the choice of the individual to receive services or engage in activities outside of the setting, whether the setting is physically separated from the broader community, and whether the setting facilitates access to the broader community.<sup>792</sup>

However, as Julie Christensen noted in her testimony, Medicaid regulations are silent on the issue of wages for people with disabilities, therefore subminimum wage employment may continue for people with disabilities, albeit in settings deemed to be sufficiently integrated.<sup>793</sup>

### **U.S. AbilityOne Commission**

The federal AbilityOne Commission (AbilityOne) and the program it administers have their origins in the Javits-Wagner-O'Day Act passed by Congress in 1971.<sup>794</sup> The mission of the AbilityOne Commission is to “provide employment opportunities for people who are blind or have significant disabilities in the manufacture and delivery of products and services to the Federal Government.”<sup>795</sup> AbilityOne states that it seeks to carry out its mission by awarding government contracts to employers that employ people who are blind or who have significant disabilities, including people with intellectual or developmental disabilities. AbilityOne awards the majority

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<sup>791</sup> U.S. Dep't of Health and Human Services, Centers for Medicare & Medicaid Services, *Home and Community-Based Settings Regulation – Heightened Scrutiny*, (March 22, 2019) <https://www.medicare.gov/sites/default/files/Federal-Policy-Guidance/Downloads/smd19001.pdf>.

<sup>792</sup> *Ibid.*

<sup>793</sup> *See supra* Note 772.

<sup>794</sup> Javits-Wagner-O'Day Act, 41 U.S.C. §§ 8501-8506.

<sup>795</sup> U.S. AbilityOne Commission, *Mission and Vision*, <https://www.abilityone.gov/commission/mission.html> (last accessed Jan. 29, 2020).

of its contracts to Community Rehabilitation Programs that often hold a 14(c) certificate.<sup>796</sup> AbilityOne currently has over 550 contractors located in every U.S. state, Guam, and Puerto Rico.<sup>797</sup>

In 2014, Executive Order 13658 established a minimum wage for some service contracts awarded by the federal government.<sup>798</sup> In 2016, AbilityOne called for all entities holding AbilityOne contracts, including non-service contracts, to pay minimum wage or above to their employees with disabilities, but this declaration is not binding on AbilityOne contractors.<sup>799</sup> Executive Order 13658 applies to AbilityOne service contracts, and as of January 1, 2020, minimum wage for federal service contracts is set at \$10.80 per hour.<sup>800</sup> While the AbilityOne Commission permits its contractors to pay employees below the minimum wage, the number of individuals working on AbilityOne contracts who are paid subminimum wages is relatively small. The Advisory Committee noted in its interim report that as of January 2015, AbilityOne contractors employed 4,426 individuals who were paid less than minimum wage.<sup>801</sup> That number accounted for 9.5 percent of all 46,630 employees of AbilityOne contractors.<sup>802</sup> 2,599 employees of AbilityOne contractors were paid less than \$5.00 per hour, and 1,827 individuals were paid between \$5.01 and \$7.24 per hour.<sup>803</sup>

In 2015, the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities found in an interim report that the AbilityOne Commission unnecessarily perpetuates segregated employment of people with disabilities, and that during Fiscal Year 2014, only 1,936 individuals were transitioned to competitive integrated

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<sup>796</sup> U.S. AbilityOne Commission, *People with Disabilities*, [https://www.abilityone.gov/abilityone\\_program/who\\_people.html](https://www.abilityone.gov/abilityone_program/who_people.html) (last accessed Jan. 29, 2020).

<sup>797</sup> Ibid.

<sup>798</sup> Ex. Order 13658, Establishing a Minimum Wage for Contractors, 79 Fed. Reg. 60633 (Oct. 7, 2014) (the minimum wage for covered federal service contracts was initially set at \$10.10 per hour and is updated annually).

<sup>799</sup> U.S. AbilityOne Comm'n, *Declaration in Support of Minimum Wage for All People Who Are Blind or Have Significant Disabilities*, (March 18, 2016), <https://abilityone.gov/commission/documents/US%20AbilityOne%20Commission%20Declaration%2018March2016%20Final.pdf>.

<sup>800</sup> Ex. Order 13658, 84 Fed. Reg. 49345 (Sept. 19, 2019).

<sup>801</sup> Interim Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at 92 (Sept. 15, 2015), <https://www.dol.gov/odep/pdf/20150808.pdf>; See also, U.S. AbilityOne Comm'n, *U.S. AbilityOne Commission Overview*, p. 13 (Jan. 23, 2015) <https://www.dol.gov/odep/topics/date/KimberlyZeich.pdf>.

<sup>802</sup> Interim Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at 92 (Sept. 15, 2015), <https://www.dol.gov/odep/pdf/20150808.pdf>.

<sup>803</sup> 1,827 individuals who have significant disabilities worked on AbilityOne contracts and were paid between \$5.01 and \$7.24 per hour.



employment.<sup>804</sup> The Advisory Committee also found that AbilityOne's call for all contractors to pay minimum wage or above had not to date been accompanied by a call for contractors to provide opportunities for people with disabilities for competitive integrated employment, or to move to an integrated business model. The Committee found in its 2015 interim report that AbilityOne contracts encouraged segregation of people with disabilities in employment settings because AbilityOne "contracts exclusively with [Community Rehabilitation Programs]" and because the Javits-Wagner-O'Day Act requires that 75 percent of hours worked on AbilityOne contracts be completed by people who are blind or who have significant disabilities.<sup>805</sup> The Advisory Committee found that these constraints resulted in "28 percent of all individuals working on AbilityOne contracts, continue[d] to be completed in sheltered workshop settings."<sup>806</sup> The 2015 interim report, sent to the DOJ's Civil Rights Division and Congress, recommended increased compliance oversight and consideration of changes in the Javits-Wagner-O'Day Act and AbilityOne federal contracts to ensure against *Olmstead* violations; these recommendations were included in the recommendations the Advisory Committee made in its 2016 *Final Report*.<sup>807</sup>

AbilityOne's statutory authority is to publish and maintain a procurement list suitable for use by federal government agencies.<sup>808</sup> The procurement list must be comprised of products produced or services provided by a qualified nonprofit agency that serves the blind or "severely disabled."<sup>809</sup> AbilityOne is also responsible for determining the fair market price of products and services on the procurement list and shall revise its price determinations as needed.<sup>810</sup> AbilityOne is also required to:

[D]esignate a nonprofit agency or agencies to facilitate the distribution, by direct allocation, subcontract, or any other means, of orders of the Federal Government for products and services on the procurement list among qualified nonprofit agencies for the blind or qualified nonprofit agencies for other severely disabled.<sup>811</sup>

Federal regulations give the AbilityOne Commission the power to determine "which commodities and services procured by the Federal Government are suitable to be furnished by qualified

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<sup>804</sup> Interim Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at 92-93 (Sept. 15, 2015), <https://www.dol.gov/odep/pdf/20150808.pdf>.

<sup>805</sup> Interim Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at 93 (Sept. 15, 2015), <https://www.dol.gov/odep/pdf/20150808.pdf>.

<sup>806</sup> *Ibid.*, 93-94.

<sup>807</sup> *Ibid.*, 96; *See*, Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities at 57-61 (Sept. 15, 2016).

<sup>808</sup> 41 U.S.C. § 8503(a).

<sup>809</sup> *Id.*

<sup>810</sup> 41 U.S.C. § 8503(b).

<sup>811</sup> 41 U.S.C. § 8503(c).

nonprofit agencies employing persons who are blind or have other severe disabilities and add those items to the Committee's Procurement List.”<sup>812</sup> For a nonprofit agency to qualify to be added to the AbilityOne procurement list, it must submit “a certified true copy of the State statute establishing or authorizing the establishment of nonprofit agency(ies) for persons who are blind or have other severe disabilities.”<sup>813</sup>

But as discussed in this chapter, gaps in federal oversight exist despite the involvement of several federal entities. In addition to no known DOJ investigations of AbilityOne entities, other gaps in federal oversight may lead to people with disabilities entering or remaining in 14(c) employment as there is no known federal entity tracking how long people have been working in subminimum wage or segregated employment and whether people with disabilities are transitioning to competitive integrated employment.<sup>814</sup> Furthermore, there is little federal oversight ensuring that people with disabilities have informed choices about their employment options.<sup>815</sup>

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<sup>812</sup> 41 C.F.R. § 51-2.2(b).

<sup>813</sup> 41 C.F.R. § 51-22.2(i).

<sup>814</sup> *See supra* note 654.

<sup>815</sup> *See supra* notes 714-726.

## CHAPTER 4: STATES AND SUBMINIMUM WAGE LAWS

This chapter focuses on six specific states and explores the available data and policy choices regarding 14(c). These are: Virginia, Arizona, and Missouri, which allow the payment of subminimum wages through different policy iterations; and Vermont, Maine, and Oregon, which are in the process of prohibiting or have prohibited payment of subminimum wages to people with disabilities.

The Commission’s research below also includes testimony and data from the Arizona State Advisory Committee to the Commission, as well as accounts of the personal experiences of employees with disabilities in two of the examined states (Vermont and Virginia). The analysis in this chapter also draws from information gathered from two site visits (one in Vermont and one in Virginia) that were conducted after the briefing by a Subcommittee of the Commission.<sup>816</sup> Each site visit included a tour, a roundtable session with local employers and community leaders, and over 15 staff interviews of employees with disabilities. The Commission’s research also includes an analysis of data comparing how people with disabilities’ employment experiences vary in each of the states studied.

As documented in prior chapters, there is nothing in the federal 14(c) legislation prohibiting states from ending the payment of subminimum wages in their states, and several states have done so.<sup>817</sup> As discussed in Chapter 1, five states have prohibited subminimum wages,<sup>818</sup> while two other states have phased them out, and thirty-one states have policies that prioritize competitive integrated employment through Employment First programs while continuing to permit some 14(c) certificate holders to operate. On the other end of the spectrum, some states remain in favor of providing the opportunity for persons with disabilities to work for subminimum wages, and advocates of employers in those states believe that their programs provide significant benefits to those employees. A map of these policies at the national level was provided in the Executive Summary (See Figure ES.1). The states studied herein have a range of relevant policies, and to help evaluate the policy options, the Commission took a deeper look at the states’ policies, available data, and perhaps most importantly, spoke with impacted people and learned from their experiences.

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<sup>816</sup> Members the Subcommittee were Commissioners Adegbile, Heriot, Subcommittee Chair Kladney, and Commission Chair Lhamon. *See*, U.S. Comm’n on Civil Rights, *Transcript of Telephonic Subcommittee Meeting* (Dec. 20, 2019). Commissioners Adegbile, Heriot and Kladney and their Special Assistants (Irena Vidulovic, Alison Somin and Amy Royce) participated in the site visits along with the following Commission Staff: Katherine Culliton-González and Marik Xavier-Brier from the Office of Civil Rights Evaluation; Maureen Rudolph and Pilar Velasquez-McLaughlin from the Office of General Counsel.

<sup>817</sup> *See supra* note 75.

<sup>818</sup> *See supra* notes 406-432.

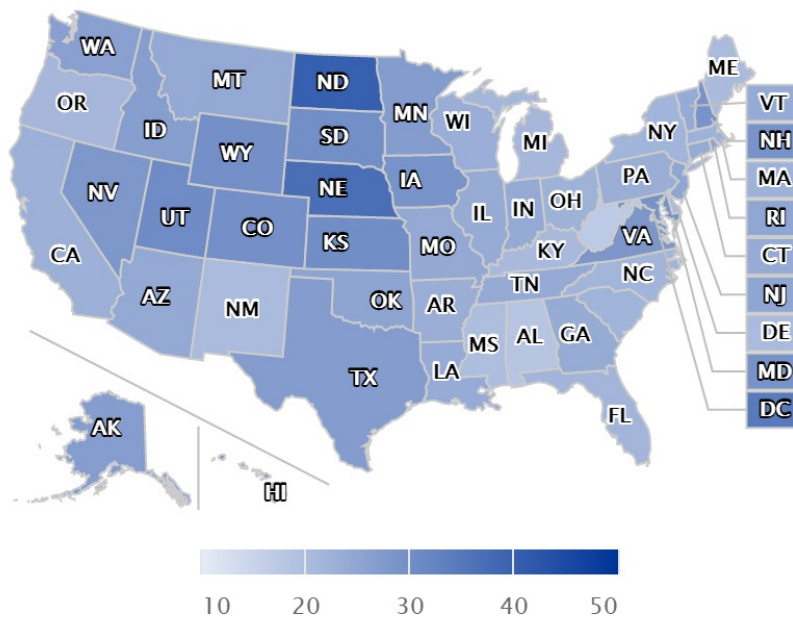
### Employment Rates

Overall, employment of persons with disabilities varies widely in the United States, and these variations may or may not be tied to Section 14(c) or related state policies. For example, although lower than for persons without disabilities, labor force participation of persons with disabilities has risen in recent years, while at the same time fewer and fewer employers holding 14(c) certificates have been in operation.<sup>819</sup>

Below is a map of Census data regarding employment rates for persons with disabilities nationwide:

**Figure 4.1**  
Full-Time / Full-Year Employment Estimate

The percentage of non-institutionalized persons aged 21–64 years with a disability in the United States who were employed full-time/full-year in 2017.

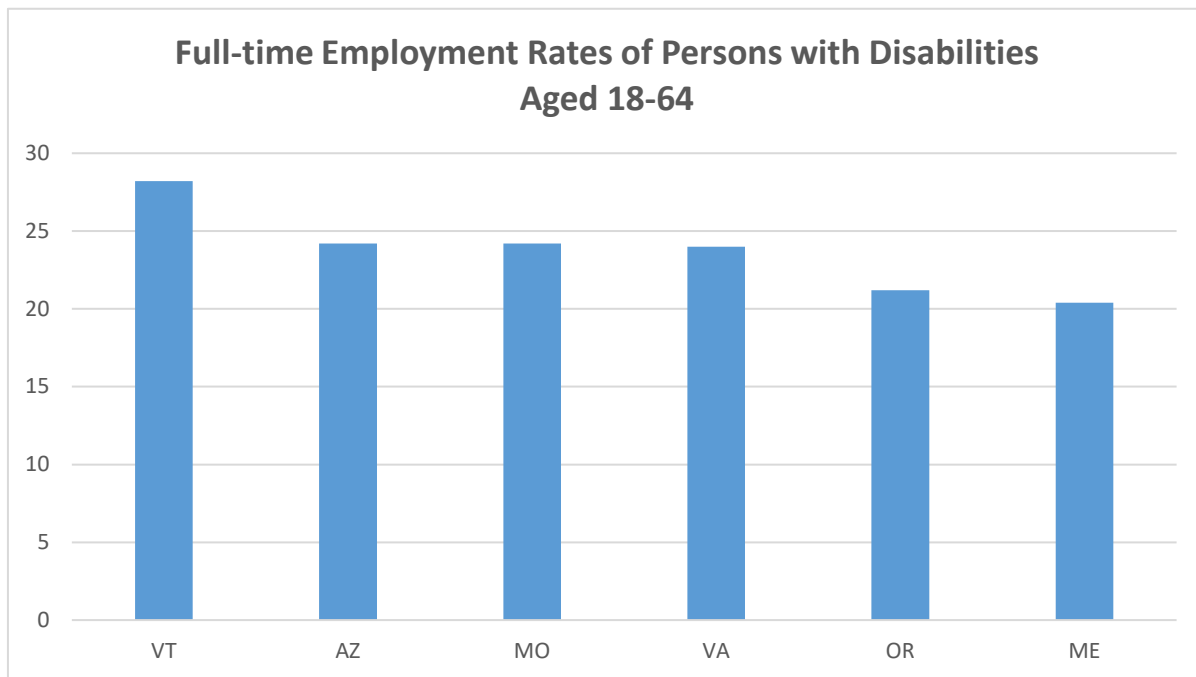


Source: Disability Statistics, Cornell Univ., <https://www.disabilitystatistics.org/reports/acs.cfm?statistic=4>.

<sup>819</sup> The labor force participation rate for people with a disability ages 16 to 64 has risen every year since 2015. In 2018, 33.3 percent of people with a disability ages 16 to 64 were in the labor force. For people without a disability, the labor force participation rate for all people ages 16 to 64 was 76.9 percent in 2018 (<https://www.bls.gov/opub/ted/2019/employment-characteristics-of-people-with-a-disability-in-2018.htm>). In 2019, 19.3 percent of persons with a disability were employed, the U.S. Bureau of Labor Statistics reported today. In contrast, the employment-population ratio for persons without a disability was 66.3 percent. The unemployment rates for both persons with and without a disability declined from the previous year to 7.3 percent and 3.5 percent, respectively (<https://www.bls.gov/news.release/disabl.nr0.htm>).

Using Census data, Commission research shows that in 2017, in the six states studied, full-time/full-year data of non-institutionalized persons with disabilities were also variable.

**Chart 4.1: Full-time/full-year Employment Rate of Non-Institutionalized Persons with Disabilities Aged 18-64**



Source: Disability Statistics, Cornell Univ., <https://www.disabilitystatistics.org/reports/acs.cfm?statistic=4>.

The chart above shows that at the macro level, the state that has phased out the payment of subminimum wages completely (Vermont) has the highest employment rate for people with disabilities, but the state allowing subminimum wages (Missouri) has the same rate as states that are phasing subminimum wages out (Maine and Oregon).

Trends in available data across these six states illustrate even further complexity. Employment rates from 2016 to 2017 show that contrary to the popular belief that ending subminimum wages will lead to job losses, the eradication of subminimum wages correlates with increased employment for people with disabilities.<sup>820</sup> However, importing these data over a wider range of states shows even more complexity.

<sup>820</sup> See *supra* notes 542-544 (summary of data in statement of Dr. Julie Christensen).

**Table 4.1: Employment Rates of People with Disabilities in Selected States**

State	Disability	2016	2017
<b>Arizona</b>	All	35.1%	36.9%
	Cognitive	25.1%	27.1%
<b>Maine</b>	All	32.4%	32.9%
	Cognitive	23.3%	24.1%
<b>Missouri</b>	All	34.2%	35.9%
	Cognitive	24.9%	28.7%
<b>Oregon</b>	All	40.1%	37.0%
	Cognitive	32.5%	29.8%
<b>Vermont</b>	All	41.4%	45.9%
	Cognitive	24.4%	41.3%
<b>Virginia</b>	All	39.5%	41.3%
	Cognitive	27.3%	29.5%

Source: Cornell Univ., Disability Statistics, “Disability Status Reports, 2016-2017,” <https://www.disabilitystatistics.org/> (accessed 4/7/2020) (2017 is most current data); Table generated by Commission staff.

The above data from 2017-2018 (the most recent available data for these subcategories) indicate that employment rates have increased in five of the six states, including all three of the selected states that maintain subminimum wages (Arizona, Missouri and Virginia).<sup>821</sup> It is not clear whether reducing subminimum wage programs correlates with better employment rates, although the employment rate for persons with cognitive disabilities is markedly higher in Vermont, which has ended subminimum wages and taken aggressive steps to find competitive integrated employment for persons with intellectual and developmental disabilities.<sup>822</sup> In Maine, which is phasing out subminimum wages, the increase in employment rates was only slight, at less than one percent for both categories.<sup>823</sup> Moreover, in Oregon, which is also phasing out subminimum wages, these data show that employment rates for all persons with disabilities, as well as for persons with cognitive

<sup>821</sup> See *infra* notes 982-1003 (regarding Arizona state policies), 1009-1012 (Missouri state policies) and 828-829 (Virginia state policies).

<sup>822</sup> See *infra* notes 1059-1060 (regarding Vermont state policies).

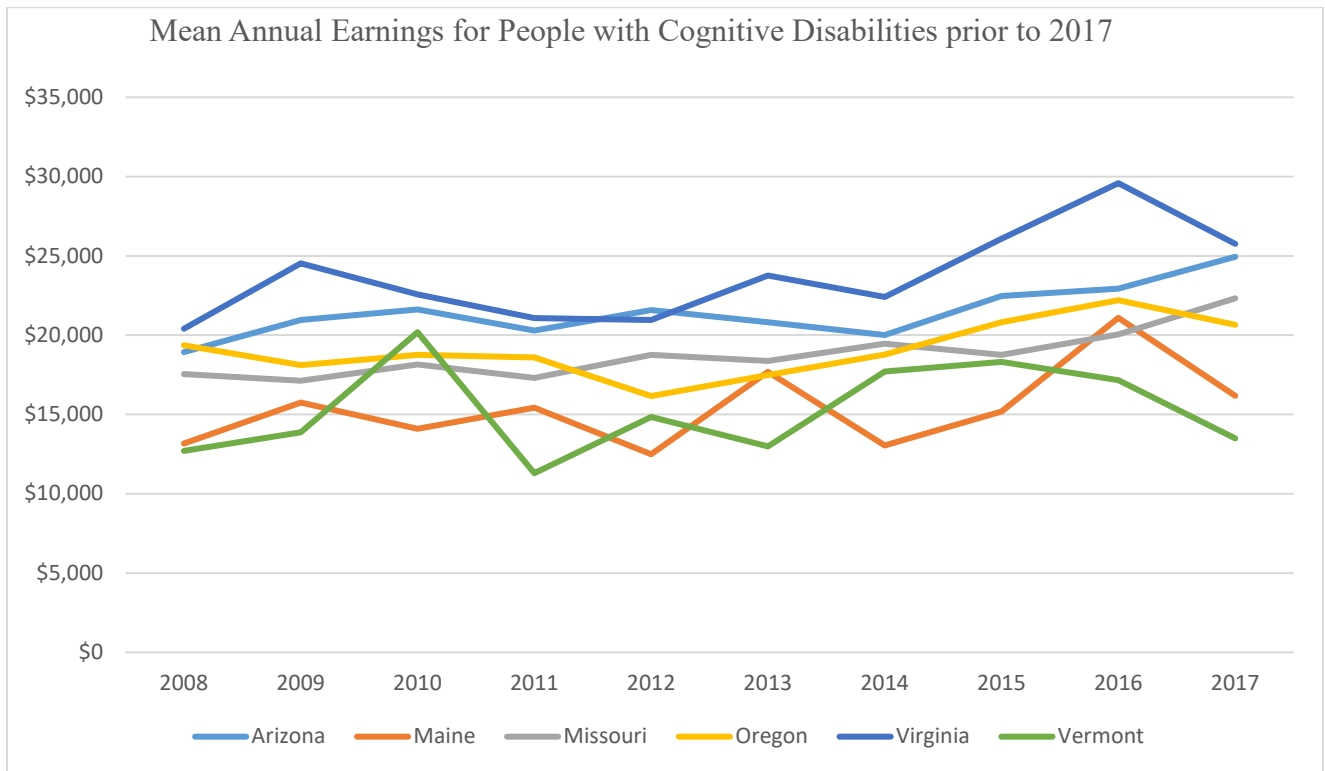
<sup>823</sup> See *infra* notes 1258-1262 (regarding Maine state policies).

disabilities, decreased between 2017 and 2018.<sup>824</sup> It is also important to note, however, that these employment rate trends may or may not be due to the particular state's policy regarding subminimum wages, as they are also influenced by shifts in the overall employment market within each state.

### Trends in Wages

The Commission also researched the six states' trends in wages by utilizing the dataset compiled by UMass Boston's Institute for Community Inclusion as reported to the Census by persons with cognitive disabilities.<sup>825</sup> The following chart shows changes in wages for persons with cognitive disabilities with all states (with and without subminimum wages) showing an increase over the last nine years.

**Chart 4.2 Mean Annual Earnings from Work for Individuals with Cognitive Disabilities among States that Eliminated Subminimum Wages (2008-2017) (in thousands of dollars)**



Source: UMass Boston, Institute for Community Inclusion, Statedata.info, <https://www.statedata.info/data/showchart/672696>.

\*2017 is most current data available

<sup>824</sup> See *infra* notes 1280-1284 (regarding Oregon state policies).

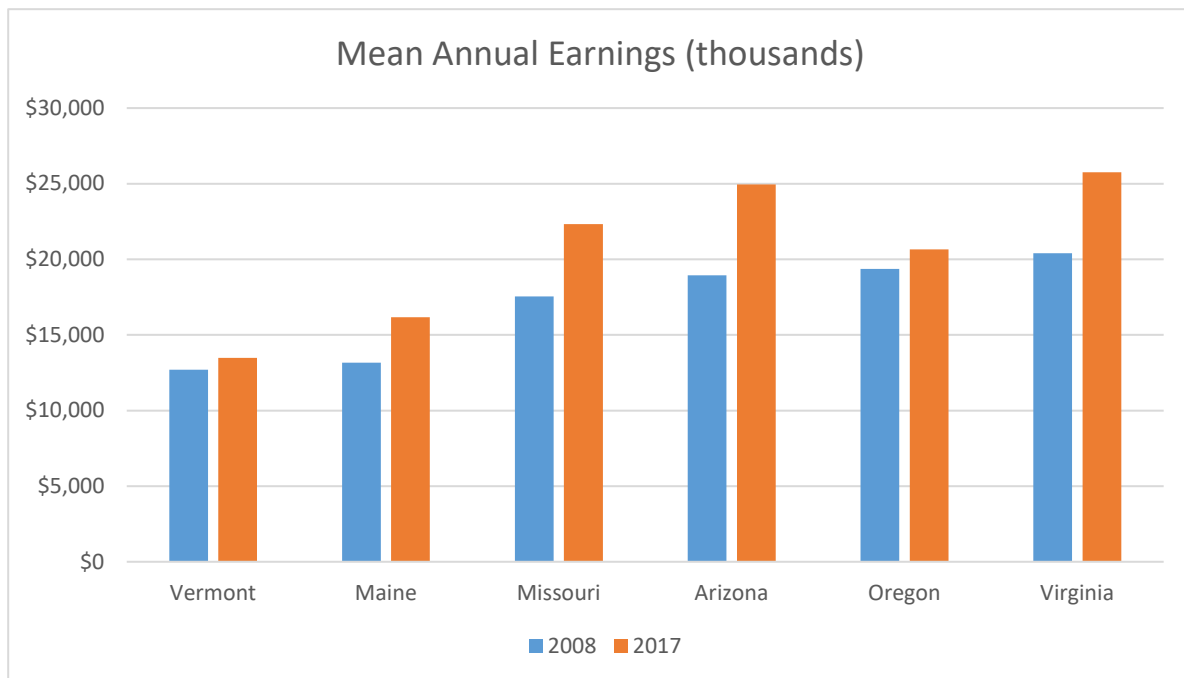
<sup>825</sup> See *supra* notes 510-513.

These data are limited by the fact that wages in general vary from state to state, but they do show some trends. For example, states that still permit subminimum wages under Section 14(c) showed increasing annual earnings of persons with cognitive disabilities. This is illustrated by the data from Arizona (indicated by dark blue line), Missouri (grey line), and Virginia (light blue line). In Vermont (green line) and Maine (orange line), both which ended the payment of subminimum wages through changes to state Medicaid funding structures beginning in 2003 and 2005 respectively, wages also increased over time, albeit less dramatically. Wages for persons with cognitive disabilities also dipped in Vermont and Maine from 2016 to 2017. Virginia also had a dip between 2016 and 2017, but Missouri's increased.

The trend in wages in Vermont and Maine over the years studied was uneven year to year, but generally favorable over the long term (see chart 4.2). For example, wages increased in Vermont by \$6,324/year between 2009 and 2010, then decreased between 2010 and 2011 by \$8,893. Also, the increase in Vermont from 2008 to nine years later, in 2017 was \$785.00. Oregon (yellow line), which will phase out 14(c) between 2020 and 2023, shows a larger overall increase but a smaller decrease from 2016 to 2017.

The data also show, however, that annual earnings have increased in each of the states over time (with the lowest earnings in Vermont and the highest in Virginia). See Chart 4.3.

**Chart 4.3: Mean Annual Earnings for Individuals with Cognitive Disabilities (2008 and 2017)**



Source: UMass Boston, Institute for Community Inclusion, Statedata.info, <https://www.statedata.info/data/showchart/672696>

\*2017 most current data available



## Integration

Available data show that persons with intellectual and developmental disabilities (about whom there is the most data) have varying rates of employment in integrated environments in each of the states studied. See Chart 4.4.

**Chart 4.4. Percent of Persons with Intellectual/Developmental Disabilities Participating in Integrated Employment Services (Among Community Rehabilitation Programs) by State, 2017**

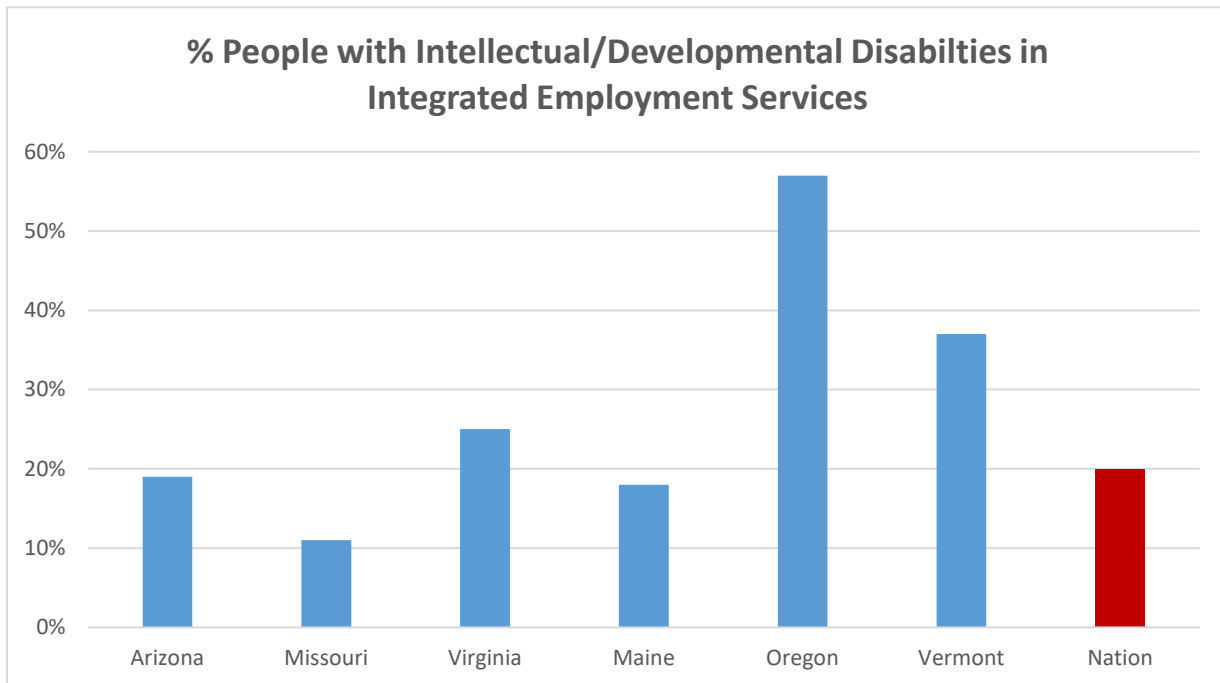


Chart created by Commission Staff

SOURCE: Univ. Mass. Institute for Community Inclusion, StateData: The National Report on Employment Services and Outcomes Through 2017, Table 5, [https://www.thinkwork.org/sites/default/files/files/bluebook2019\\_Final.pdf](https://www.thinkwork.org/sites/default/files/files/bluebook2019_Final.pdf); See also UMass Boston, Institute for Community Inclusion, Statedata.info, State Employment Snapshot, <https://www.statedata.info/statepages/Arizona>.

There is some correlation between the policies that would phase out subminimum wages and employment outcomes, but the data represent only a subset of persons with disabilities. For example, Virginia has more employment integration for the persons served than Maine, which again shows that integration is possible in a state with 14(c) programs.

Individual state trends over time are also available, but it was not possible to compare these trends across the states, as each has a different base population, so these trends are instead presented at the state level in each of the sections below.<sup>826</sup>

<sup>826</sup> See *infra* Charts 4.5, 4.6, 4.7, 4.10, 4.11, and 4.12.

University of Massachusetts' Institute for Community Inclusion also states that the data about integration in employment settings are nuanced, noting that:

State-by-state variation masks growth in integrated employment. . . . Twenty-six states reported an increase in the number of individuals in integrated employment services, with an average increase of 820 individuals (range: 3–3,838). States that reported increasing the number of individuals served in integrated employment by more than 500 individuals between 2007 and 2017 were CA, CO, KY, MN, MS, NH, NY, OH, OR, and WA. Each of these states has engaged in strategic efforts and systematic changes to their service delivery system to make integrated employment the preferred service outcome for adults with [intellectual/developmental disabilities] in their state. However, the number of individuals reported as receiving integrated employment services declined in 11 states, with an average reduction of 456 (range: 28–2,191).<sup>827</sup>

Thus, comparative data have limits. But by evaluating some of the available data at the state and local level, along with a discussion of the state policy and the input of community leaders in the six states below, the Commission hopes to contribute to better understanding the issues at stake.

### **States that Allow Subminimum Wages under Section 14(c)**

#### *Overview*

As discussed in Chapter 2, 14(c) certificates are issued in 46 states and the District of Columbia; however, many of those states are in the process of transitioning away from subminimum wages under 14(c). The overwhelming majority of public comments received during the 30 days after the Commission's briefing were from persons in favor of maintaining the 14(c) program. The map in Figure 2.5 shows that among the public commenters who participated, their views are spread across many states, particularly in states that allow subminimum wages under 14(c) such as Arkansas, California, Illinois, Missouri, New Jersey, North Carolina, Pennsylvania, and Wisconsin. The Commission also heard testimony at the briefing that strongly favored continuing to allow subminimum wages under 14(c), arguing that jobs provided under a 14(c) certificate provided a safe and dignified place for persons with disabilities. The Commission also heard extensive and concerned testimony against the certificate program and received public comments against its continued use, but equally concerning were the comments from impacted people and their families who feared that opportunities provided by this program would be taken away if it was eradicated, and they would be left without the benefits they receive by having the ability to work.

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<sup>827</sup> Univ. Mass. Institute for Community Inclusion, *StateData: The National Report on Employment Services and Outcomes Through 2017*, pp. 18-19, [https://www.thinkwork.org/sites/default/files/files/bluebook2019\\_Final.pdf](https://www.thinkwork.org/sites/default/files/files/bluebook2019_Final.pdf).

To better understand 14(c) programs, especially from the point of view of impacted communities, the Commission researched three states that maintain the program: Arizona, Missouri and Virginia. This section also includes research from a site visit to an employer who holds a 14(c) certificate in Virginia, discussed below. The site visit included a tour, a roundtable with the employer and key staff as well as some family members, and Commission staff interviews with 15 employees with disabilities (although only one was an employee who earned subminimum wages under Section 14(c)).

### *Virginia (Site Visit)*

As of January 1, 2020, Virginia had sixteen issued and pending 14(c) certificate holders.<sup>828</sup> On March 3, 2020, the Commission's Subcommittee visited MVLE, a 14(c) certificate holder located in Springfield, Virginia.<sup>829</sup> Members of the Subcommittee as well as the Commission's General Counsel participated in a tour and roundtable discussion, while Commission staff interviewed employees. MVLE had indicated in advance that the tour would enable the Subcommittee to see various 14(c) employees working, but on the day of the tour only one person who was paid a subminimum wage was working—this means that most of the information observed during the tour and collected from the interviews relate to employees who were no longer working for subminimum wages.

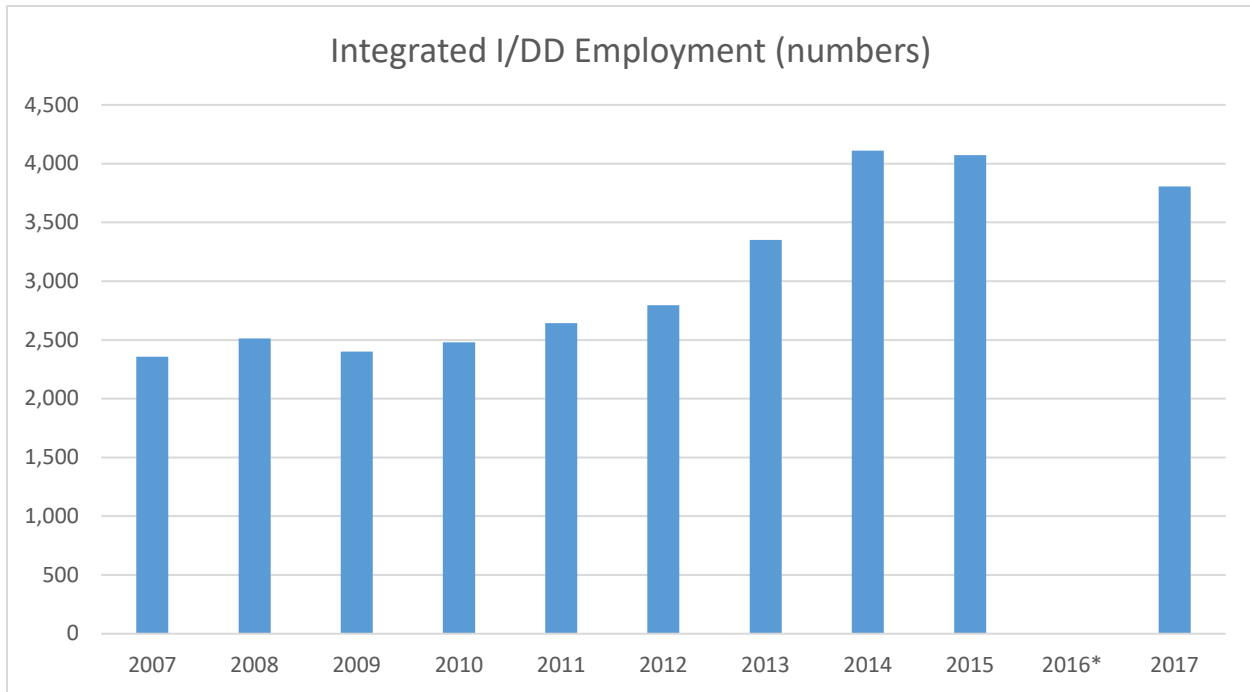
The Overview section of this chapter shows increasing employment rates and wages for persons with disabilities in Virginia. In addition, the following research shows a steady increase in integration over the past 10 years.

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<sup>828</sup> U.S. Dep't of Labor Wage and Hour Division, *Community Rehabilitation Programs (CRPs) List* (July 1, 2019) <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders/county-rehabilitation-programs> (last accessed Feb. 18, 2020).

<sup>829</sup> See About Us, MVLE.org; see also U.S. Dep't of Labor Wage and Hour Division, *14(c) Certificate Holders* (Jan. 1, 2020) <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders/county-rehabilitation-programs> (last accessed Apr. 8, 2020); Wage and Hour Division, Response to Affected Agency Review (May 19, 2020) (on file).

**Chart 4.5: Number of Individuals with Cognitive Disabilities working in Integrated Employment, Virginia (2007-2017)**



Source: UMass Boston, Institute for Community Inclusion, Statedata.info, "State IDD Agencies: Virginia," <https://www.statedata.info/data/showchart/185684>

\*Indicates data are not available for that year

### *Tour*

MVLE hosted the Subcommittee on March 3, 2020, and the visit began with a tour. During the tour, MVLE told the Commission that they currently have 55 employees working in the 14(c) program, 144 receiving supports and services, 75 in individual placements, and 67 working in AbilityOne government contracts.<sup>830</sup> Although the agreed-upon purpose for visiting MVLE was to study their 14(c) program, MVLE only made one employee earning a subminimum wages available for a Commission interview and work observation.<sup>831</sup>

<sup>830</sup> Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020); for more information on the federal AbilityOne program, *see supra* notes 794-813.

<sup>831</sup> See Email from Rukku Singla, Special Assistant to Chair Catherine E. Lhamon, to April Pinch-Keeler, President, MVLE, dated Jan. 16, 2020 (stating that the Commission's purpose was "to better understand and observe the work center model that MVLE operates and the employment provided under the 14(c) certificate, the Commissioners and our civil rights research staff would take a tour of the facility, engage in a roundtable with select stakeholders including MVLE management, and interview MVLE employees and family members").

MVLE's tour began at the Greenspring retirement community,<sup>832</sup> where MVLE has a hospitality contract staffed with workers with disabilities, and the Subcommittee observed approximately eight individuals with disabilities working.<sup>833</sup> During the tour, MVLE staff stated that one of these workers is under their 14(c) certificate earning a commensurate wage, and all others make at least minimum wage. In a follow-up letter, MVLE clarified that the Greenspring site in fact "has three individuals who currently work under the Department of Labor (DOL) 14(c) certificate," noting during the tour "there was a misstatement that only one MVLE individual works under the certificate."<sup>834</sup> The Commission observed workers rolling silverware in napkins, moving equipment around on carts, washing dishes, and filling table containers with sugar packets.<sup>835</sup> The manager of the hospitality program spoke to the group and stated that he was very happy with the MVLE contract and that in his two-year tenure as manager, they had hired two MVLE workers full time.<sup>836</sup>

MVLE stated individuals on the Greenspring contract might start as 14(c) employees earning below minimum wage, but the goal was to increase their skills so they could earn a prevailing wage. MVLE described their use of the 14(c) program as a way to provide on-site training to people who might not be familiar with this type of employment setting.<sup>837</sup>

The Commission's Subcommittee noted that during their tour, workers with disabilities were interacting primarily or solely with other workers with disabilities, such as a group sitting at tables rolling silverware together.<sup>838</sup> The workers with disabilities were being given direction by two job coaches who were not persons with disabilities, who were there providing support.<sup>839</sup> One of the job coaches reported that she saw people grow, and that some learned very quickly,<sup>840</sup> although she noted that no one left had for a different job during the three years she had been working at Greenspring.<sup>841</sup>

MVLE staff gave an example of a time trial (typically done to measure skills) that might occur in this environment such as clocking the number of racks a worker could load in the dishwasher over

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<sup>832</sup> See Erickson Living, *Greenspring Retirement Community*, <https://www.ericksonliving.com/greenspring> (last accessed May 25, 2020).

<sup>833</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020); Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

<sup>834</sup> Letter of June 10, 2020 from MVLE to the Commission (on file).

<sup>835</sup> Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

<sup>836</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

<sup>837</sup> *Ibid.*

<sup>838</sup> *Ibid.*

<sup>839</sup> Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

<sup>840</sup> *Ibid.*

<sup>841</sup> *Ibid.*

a certain amount of time. They noted they do time trials discreetly so workers do not know they are being timed.<sup>842</sup> MVLE reported that the time trails are done according to Department of Labor industry standards for setting wages based on skillsets,<sup>843</sup> and that at the workers at Greenspring are “at the higher end of the threshold.”<sup>844</sup>

Staff stated they have 20 sites where workers provide services with support from MVLE, and that some are paid subminimum wages under a 14(c) certificate and some are not. During the tour of Greenspring, MVLE staff stated that one of the greatest challenges to people finding and keeping employment is the lack of reliable paratransit or other door-to-door transportation services in the area.<sup>845</sup> During employee interviews, one employee noted that they appreciated that their job through MVLE included transportation, and that they are unsure that another job would provide the transportation they require to work.<sup>846</sup> MVLE staff also stated that some of their employees use METRO access (the accessible public transportation system that is door-to-door), and that Medicaid pays for some of the employees’ transportation.<sup>847</sup>

The Subcommittee was then given a tour of the main MVLE site, where they were not able to observe MVLE’s business center, where MVLE contracts for shredding and scanning services; however MVLE staff stated that no 14(c) workers currently work in the business center.<sup>848</sup> The Subcommittee observed a dance and movement class where arts instructors and staff work with individuals with disabilities to conceive and perform a dance/movement piece. MVLE stated the Subcommittee could not observe day services as they had not coordinated it in advance, and that it probably would consist of people just eating lunch.<sup>849</sup> Lastly, during the tour of the main building, MVLE staff pointed out photos of individuals with disabilities who had received special honors.<sup>850</sup>

### *Roundtable*

The MVLE site visit included a roundtable discussion on the topic of subminimum wages on March 3, 2020 and consisted of a Subcommittee of the Commission with Commissioner Kladney,

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<sup>842</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

<sup>843</sup> See *supra* notes 136-141 (describing Section 14(c) requirements regarding setting wages in relation to prevailing wage).

<sup>844</sup> Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

<sup>845</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

<sup>846</sup> See *infra*, note 972.

<sup>847</sup> Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

<sup>848</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

<sup>849</sup> *Ibid.*

<sup>850</sup> *Ibid.*

Commissioner Adegbile, and Commissioner Heriot present.<sup>851</sup> The roundtable was convened on site at MVLE, a 14(c) certificate holder, to discuss their programs for individuals with intellectual and developmental disabilities and their business practices surrounding those programs.<sup>852</sup> Below are the individuals who were present, with their titles and organizations listed.

- April Pinch-Keeler, President and Chief Executive Officer, MVLE
- Kenan Aden, Vice President and Chief Operating Officer, MVLE
- Cathy Pennington, MVLE Board Director and Treasurer; Small Business Certified Public Accountant
- Joanne Aceto, Senior Director of Employment Services, MVLE
- Michelle Lotrecchiano, Senior Director of Program Services, MVLE
- Linda Brinkley, Senior Program Manager of Operations, MVLE
- James Clark, Quality Manager, MVLE
- Ashley Welsh, Program Manager for Transition and Training, MVLE
- Carol Skelly, Chairperson of the Intellectual Disabilities Board, a subcommittee of the Community Services Board of Arlington County, VA.<sup>853</sup>

President April Pinch-Keeler stated that MVLE provides an array of services that are covered through their day support model.<sup>854</sup> According to Ashley Welsh, the Program Manager of Transition and Training at MVLE, a day support model is a therapeutic recreational day program.<sup>855</sup> At the roundtable, MVLE’s president explained that the organization phased out their sheltered support model due to a lack of jobs and less individual interest in being in sheltered environments,<sup>856</sup> clarifying that it now offers job opportunities through both group and individual supported employment models.<sup>857</sup> According to Joanne Aceto, Senior Director of Employment Services, MVLE has over 20 work sites for individuals, and it is considered the “employer” at all times.<sup>858</sup> According to Linda Brinkley, Senior Program Manager of Operations, the support that MVLE provides helps people transition from high school into employment by providing them job training and skills, which “gives them the opportunity to be successful, to be independent, and to

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<sup>851</sup> David Kladney, Commissioner and Chair of Subcommittee on Subminimum Wages, U.S. Commission on Civil Rights, testimony, *Subminimum Wages Virginia Roundtable*, p. 4.

<sup>852</sup> *Ibid.*

<sup>853</sup> *Subminimum Wages Virginia Roundtable Transcript*, p. 2.

<sup>854</sup> April Pinch-Keeler, President and CEO at MVLE, testimony, *Subminimum Wages Virginia Roundtable*, p. 7.

<sup>855</sup> Welsh Testimony, *Subminimum Wages Virginia Roundtable*, p. 33; *See supra* note 203 (describing supported employment); and *see infra* notes 868-870 (regarding specific supported employment programs at MVLE).

<sup>856</sup> Pinch-Keeler Testimony, *Subminimum Wages Virginia Roundtable*, p. 8.

<sup>857</sup> Aceto Testimony, *Subminimum Wages Virginia Roundtable*, p. 18.

<sup>858</sup> *Ibid.*

be able to able to develop their career path and move into integrated competitive employment.”<sup>859</sup> MVLE’s Quality Manager James Clark stated that MVLE is “meeting [individuals] at their ability, not at their level of disability,” and “letting them play to their strengths and not their weaknesses.”<sup>860</sup>

Program Manager of Transition and Training Ashley Welsh, indicated that there is a push for job training programs for students with intellectual and developmental disabilities, for which pre-employment can start at the age of 14 via an individual’s Individual Education Plan.<sup>861</sup> She stated that there are career schools in a local county in Virginia where students can receive employment training from ages 18 to 22.<sup>862</sup> MVLE receives referrals for students from the age of 22 who are ready to graduate, many of whom are referred to group supported employment or day support.<sup>863</sup> Michelle Lotrecchiano, Senior Director of Program Services at MVLE, indicated that individuals coming from school are required to do a counseling session (as a once-a-year requirement) consisting of some group sessions as well as one-on-one interactions.<sup>864</sup>

President Pinch-Keeler estimated that nearly 75 percent of individuals with disabilities in the area in which MVLE is located (in the Springfield, VA area) are unemployed, but because they have never been employed, they are not counted in the unemployment rate.<sup>865</sup> Vice President and Chief Operating Officer Kenan Aden added that the backlog of persons with disabilities looking for jobs mirrors the unemployment rate in Virginia, so there will always be individuals that are looking for work.<sup>866</sup> Lotrecchiano noted that it is a challenge to find employers who want to work with the population they serve, due to the levels of support needed, potential medical challenges, or administrative/logistical challenges.<sup>867</sup> Aden went on to state that MVLE’s challenge is also having different individuals needing different levels of support, as follows:

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<sup>859</sup> Linda Brinkley, Senior Program Manager of Operations at MVLE, testimony, *Subminimum Wages Virginia Roundtable*, p. 14.

<sup>860</sup> James Clark, Quality Manager at MVLE, testimony, *Subminimum Wages Virginia Roundtable*, pp. 12-13.

<sup>861</sup> Welsh Testimony, *Subminimum Wages Virginia Roundtable*, p. 32. The Individuals with Disabilities Education Act requires Individualized Education Plans (IEPs) are required for public school students who receive special education and related services. See 33 U.S.C. § 1414.

<sup>862</sup> *Ibid.*, p. 34.

<sup>863</sup> *Ibid.*, pp. 32-33.

<sup>864</sup> Michelle Lotrecchiano, Senior Director of Program Services at MVLE, testimony, *Subminimum Wages Virginia Roundtable*, p. 63.

<sup>865</sup> Pinch-Keeler Testimony, *Subminimum Wages Virginia Roundtable*, p. 60.

<sup>866</sup> Kenan Aden, Executive Vice President and COO at MVLE, testimony, *Subminimum Wages Virginia Roundtable*, p. 65.

<sup>867</sup> Lotrecchiano Testimony, *Subminimum Wages Virginia Roundtable*, pp. 60-61.



The challenge might be, in some cases, that different people need different levels of support. So when I go to that employer that has that one job available, and I say, hey, please hire my person. The person I bring to the table is not necessarily going to be a person that needs someone to support them all day long.<sup>868</sup>

At the roundtable, staff discussed that MVLE provides two different tracts of day services: (1) a therapeutic day program focused on therapeutic activities (therapy services, nursing services, and behavioral supports), community activities, and volunteering, and which also provides support services (nursing, behavioral, speech, language, etc.); and (2) an employment training program for recent grads who are not ready to work, teaching “soft skills.”<sup>869</sup> At the time of the March 2020 roundtable discussion, approximately 220 clients were offered day services.<sup>870</sup>

MVLE staff stated that they try to maximize opportunities and increase efficiency, so MVLE’s model is often to have an employer buy into a group support contract versus hiring individuals directly, which “provides the opportunity for skilled development that an employer’s not going to pay out of the gate.”<sup>871</sup> When looking to partner with an employer for group supported employment, MVLE aims to have a minimum group of three individuals hired at one time; however the same employer could also provide individual employment, and MVLE might push to have one group and an additional individual hired.<sup>872</sup> Vice President Aden indicated that the baseline is always one position, stating that the “first option is to try to get someone...hired directly by this employer.”<sup>873</sup>

Regarding 14(c) programs, Aden indicated that depending on who you talk to, the definitions for these types of programs may differ.<sup>874</sup> He stated that the idea that there is only one type of 14(c) program is a misconception; MVLE utilizes its 14(c) certificate to place people with employment based on their abilities and the level of support needed to help them succeed.<sup>875</sup> Aden went on to explain that individuals that were observed during the site visit started on 14(c) and matriculated, and are now “on the path to getting a competitive job being directly employed with another employer.”<sup>876</sup> The definition of “competitive” also differs, but it could still mean that an individual

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<sup>868</sup> Aden Testimony, *Subminimum Wages Virginia Roundtable*, pp. 65-66.

<sup>869</sup> Lotrecchiano Testimony, *Subminimum Wages Virginia Roundtable*, pp. 78-79.

<sup>870</sup> *Ibid.*, p. 84.

<sup>871</sup> Pinch-Keeler Testimony, *Subminimum Wages Virginia Roundtable*, p. 70.

<sup>872</sup> Lotrecchiano Testimony, *Subminimum Wages Virginia Roundtable*, p. 64.

<sup>873</sup> Aden Testimony, *Subminimum Wages Virginia Roundtable*, p. 64.

<sup>874</sup> Aden Testimony, *Subminimum Wages Virginia Roundtable*, pp. 35-36.

<sup>875</sup> *Ibid.*, p. 36, 37.

<sup>876</sup> *Ibid.*, p. 36.

is receiving some level of support, if only for the application process or the orientation.<sup>877</sup> Aden commented that 14(c) is “an a la carte item” and typically “not something that we kind of swath across an entire program.”<sup>878</sup>

MVLE’s Quality Manager James Clark shared that he believes the 14(c) program has opened doors and provided meaningful opportunities to the individuals that MVLE serves.<sup>879</sup> According to Senior Director of Employment Services Aceto, it is “a mechanism for getting employment, for getting that first job, if people so choose and want to work independently.”<sup>880</sup> The program also serves as a “stepping stone” available to these individuals, enabling them to “learn skills that they may not have been able to learn if they were put straight into a competitive setting, where they didn’t have as much support as we were able to offer them.”<sup>881</sup> Aceto stated further that MVLE staff have seen individuals successfully transition from group employment to individual supported employment, and from 14(c) to commensurate wages, when they no longer need a regular job coach.<sup>882</sup> MVLE Board Director and Treasurer Cathy Pennington stated that the opportunities created by 14(c) give individuals a sense of pride and purpose, and for many, it’s not about the wages but rather about the opportunity to contribute to society and “be like everyone else.”<sup>883</sup>

Quality Manager Clark explained how individuals are measured for time, stating that key tasks of any given job (that are measurable) are measured with a stopwatch, and the individuals being timed are not alerted ahead of time, so as not to hinder productivity.<sup>884</sup> Times are recorded for the individual employees with disabilities and compared to the time of a non-disabled person.<sup>885</sup> Individuals are timed three separate times while performing a prominent task, and an average is taken.<sup>886</sup>

Board Director Pennington asserted that:

It is a major concern within the Commonwealth to ensure that no one gets left behind as they make employment choices, and have opportunities to work, and just have that choice

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<sup>877</sup> Ibid., p. 37.

<sup>878</sup> Ibid., p. 38.

<sup>879</sup> Clark Testimony, Subminimum Wages Virginia Roundtable, p. 13.

<sup>880</sup> Aceto Testimony, Subminimum Wages Virginia Roundtable, p. 19.

<sup>881</sup> Welsh Testimony, Subminimum Wages Virginia Roundtable, p. 11.

<sup>882</sup> Aceto Testimony, Subminimum Wages Virginia Roundtable, p. 18.

<sup>883</sup> Catherine Pennington, CPA and MVLE Board Treasurer, testimony, *Subminimum Wages Virginia Roundtable*, p. 22.

<sup>884</sup> Clark Testimony, Subminimum Wages Virginia Roundtable, p. 47.

<sup>885</sup> Ibid., pp. 48-49.

<sup>886</sup> Ibid., p. 49.

available for anyone with a disability, regardless of the level of disability, or the level of support [needed].<sup>887</sup>

Pennington also stated that there is currently a lack of resources in Virginia, which can have an adverse effect on an individual's choice and their ability to advance their career path.<sup>888</sup> Pinch-Keeler added that if the "14(c) certificate program were to go away, it would jeopardize many of the jobs that you see."<sup>889</sup> Carol Skelly, Chairperson of the Intellectual Disabilities Board, which is a subcommittee of the Community Services Board in Arlington County, Virginia, depicted what changes to 14(c) could mean for many workers as follows:

It's a basic principle of economics that the more you charge for a service, the lower the quantity that will be purchased. In the posed 14c world, the work... will either disappear, or it will be done by others who are more capable and need fewer accommodations to work...[W]hat I want you to think about is that money is not the only benefit of work. It also provides dignity, engagement, and a sense of self worth, and that those are basic human rights, as much as being paid a competitive wage.<sup>890</sup>

With regard to a potential repeal of 14(c), Aden stated that he is worried about "the gap that so many people potentially could fall through if we make an arbitrary change to a system," but acknowledges that "a lot of improvement...can be made to [the system]."<sup>891</sup> He maintained, though, that the potential repeal of 14(c) could become a barrier to access and "a major rights issue around the right to work and inclusion."<sup>892</sup> Pinch-Keeler indicated that potential policy changes that are confronting them "are philosophically based, and not necessarily realistic for all segments of the population we support," and said the "pattern of these changes ahead creates a system limiting choices and negatively impacting those individuals with the most significant disabilities."<sup>893</sup>

Aceto stressed that MVLE are concerned for the more than 600 people who are currently employed through 14(c) in the Commonwealth of Virginia if it were repealed, questioning:

Is there going to be some sort of opportunity for employment training, resources allocated so that they still have that option of working? Whether that's working at 50 percent

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<sup>887</sup> Pennington Testimony, *Subminimum Wages Virginia Roundtable*, p. 18.

<sup>888</sup> *Ibid.*, p. 20; Lotrecchiano Testimony, *Subminimum Wages Virginia Roundtable*, p. 17.

<sup>889</sup> Pinch-Keeler Testimony, *Subminimum Wages Virginia Roundtable*, p. 9.

<sup>890</sup> Carol Skelly, Chairperson, Intellectual Disabilities Board, a subcommittee of the Community Services Board in Arlington County, VA, testimony, *Subminimum Wages Virginia Roundtable*, pp. 29-30.

<sup>891</sup> Aden Testimony, *Subminimum Wages Virginia Roundtable*, p. 26.

<sup>892</sup> *Ibid.*, p. 26.

<sup>893</sup> Pinch-Keeler Testimony, *Subminimum Wages Virginia Roundtable*, p. 31.

productivity level, and they maintain the current job they have, you know, and now we're looking, you know, now, what are they going to earn?<sup>894</sup>

Pinch-Keeler also noted that “we need to make sure that we recognize companies that we can be part of that recognition for diversification, that they get goals for hiring people with disabilities, and make that part of, not just a government contract, but public renewals, for hitting percentages of people hired with disabilities, being a good community partner in your community.”<sup>895</sup> She additionally stated that there is a lack of peer-reviewed, longitudinal research that supports the withdrawal of 14(c), noting that there is “no data that we know of that...eliminating the certificates will have a positive impact for individuals with significant intellectual and developmental disabilities.”<sup>896</sup>

#### *Interviews:*

Commission staff interviewed a total of 15 employees at MVLE, all of whom are persons with disabilities including cerebral palsy, dyslexia, Down’s syndrome, attention deficit hyperactivity disorder, 50 percent hearing, and other disabilities. All persons whom the Commission interviewed were at some point employed under a 14(c) certificate.<sup>897</sup> Interviewees generously told Commission staff about themselves and their work. All of the individuals interviewed indicated that they liked their jobs, and they had few complaints. Their stories also provided evidence that they enjoyed the company of their co-workers and developed a sense of community and even family. Regarding their pay, only one person interviewed was currently receiving subminimum wages.<sup>898</sup> When asked what they liked and disliked about their jobs, all 15 employees interviewed said that they liked their jobs, and many added that they liked the people they worked with. Only a few told Commission staff about any specific dislikes.<sup>899</sup> Most worked in janitorial cleaning, delivering newspapers, or in a retirement home where they assisted with clearing and setting tables and similar tasks. Only a few knew how much they made, and while some recalled hearing about other job opportunities and expressed a desire to learn new skills or make more money, others did not. They all felt that they could tell their supervisors about any problems they experienced.<sup>900</sup>

Of the 15 individuals interviewed, only one was employed under 14(c) and receiving subminimum wages. He indicated that he was making \$4.00/hour. The remaining 14 employees were making

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<sup>894</sup> Aceto Testimony, Subminimum Wages Virginia Roundtable, p. 91.

<sup>895</sup> Pinch-Keeler Testimony, Subminimum Wages Virginia Roundtable, p. 93.

<sup>896</sup> *Ibid.*, p. 94.

<sup>897</sup> Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

<sup>898</sup> Commission Staff Interview Notes (on file).

<sup>899</sup> OCRE Interview Notes (Mar. 3, 2020) (on file).

<sup>900</sup> OCRE Interview Notes (Mar. 3, 2020) (on file).

minimum wage, which is \$7.25/hour in Virginia; however, some of them had received subminimum wages in the past. MVLE began paying most employees minimum wage in approximately 2019. Job coaches (who were present in some of the interviews to support the employees) told Commission staff that this occurred after a DOJ ruling, but it was not a ruling against MVLE in particular.<sup>901</sup> Although all the employees were asked and answered the same questions, each shared different parts of their life stories, which are summarized below.

- The employee making subminimum wages, D.Y., told staff that he is 31 years old and had worked at MVLE for one year.<sup>902</sup> He said it was his first job and stated that he works in the dish room, busses tables, stacks and unloads dishes, and sets tables. When asked if he liked his work, he nodded yes, and did the same when asked if he liked the people he worked with. When asked how much he makes, he pointed at \$4.00 per hour.<sup>903</sup> When asked if MVLE talked to him about other types of job opportunities, he also nodded yes, and agreed with his job coach (who was present in the interview to support him) that the last time he had heard about new job opportunities was last year.<sup>904</sup>
- Glenda Meade, a 71 year-old woman, told staff that she had been working for MVLE for almost 38 years, and that her work anniversary was the following Sunday.<sup>905</sup> She spoke very excitedly about this milestone and when asked what she would do to celebrate, she smiled and said that she would relax. Ms. Meade said that MVLE was her first and only job, where her work consisted of “anything they asked me to do,” including shredding, labelling and inserting, “whatever I found I can do.”<sup>906</sup> Also, she “like[s] to come in every day, but stay home when it snows,” and that she likes the people she works with.<sup>907</sup> She currently makes minimum wage, \$7.25 per hour, and she did not remember how MVLE determines how much she makes.<sup>908</sup> When asked if MVLE talked to her about other opportunities, she commented: “I can go somewhere else if I wanted, but I want to stay here. They feel like family. I’ve been here all my working years, 38 years.”<sup>909</sup> When asked

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<sup>901</sup> OCRE Interview Notes, Comments of Several Job Coaches (Mar. 3, 2020) (on file).

<sup>902</sup> OCRE Interview Notes, D.Y. (Mar. 3, 2020) (on file) (D.Y. consented to using his initials in the report).

<sup>903</sup> Ibid.

<sup>904</sup> Ibid.

<sup>905</sup> OCRE Interview Notes, Glenda Meade (Mar. 3, 2020) (on file) (Ms. Meade consented to using her full name in the report).

<sup>906</sup> Ibid.

<sup>907</sup> Ibid.

<sup>908</sup> Ibid.

<sup>909</sup> Ibid.

what skills training she received, she commented that she learned social skills, and her job coach added that she learned interview skills.<sup>910</sup>

- Jessica Fichman, age 63, said she had worked at MVLE for six years. MVLE was not her first job, though, and she previously worked at Savi’s Source. She said that at MVLE, she rolls newspapers, puts them in plastic bags, and delivers them, and on other days she prepares and shreds papers.<sup>911</sup> When asked what she likes about her job, she shrugged, and when asked what she dislikes about her job, she said “lack of work,” explaining that she would like to have more work as she only works two days a week and is “bored on other days.”<sup>912</sup> Her job coach prompted her to explain that on the other days, she does searches, and participates in stories, discussions, volunteer activities and learning sign language.<sup>913</sup> Ms. Fichman was not aware of how much she makes per hour, nor did she recall the last time she had received a raise.<sup>914</sup> Her job coach who was present in the interview stated that she makes \$7.25/hour and she agreed. He also explained that she was paid at a piece rate but since two-three years ago, all of the persons who work at MVLE is paid minimum wage, \$7.25/hour, but “not everybody works.”<sup>915</sup> When asked about job and skills training opportunities, Ms. Fichman did not recall any, and said that she was interested in learning about other opportunities.<sup>916</sup> Her job coach said that she was given the opportunity to work in the janitorial crew five days a week, but she opted out; however, Ms. Fichman insisted that she was not.<sup>917</sup>
- Sally Whiltie, age 56, told Commission staff that she has worked at MVLE since April 2019 as part of the janitorial staff, whose responsibilities included sweeping, mopping and taking out the trash.<sup>918</sup> When asked what she likes and dislikes about her job, she said it “keeps me busy,” and that although she dislikes mopping the halls, she “likes everything else.”<sup>919</sup> She said that she would feel comfortable telling MVLE if there was something she did not like in her job.<sup>920</sup> Ms. Whiltie said that she was making \$9.40 per hour at her

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<sup>910</sup> Ibid.

<sup>911</sup> OCRE Interview Notes, Jessica Fichman (Mar. 3, 2020) (on file) (Ms. Fichman consented to using her full name in the report).

<sup>912</sup> Ibid.

<sup>913</sup> Ibid.

<sup>914</sup> Ibid.

<sup>915</sup> Ibid.

<sup>916</sup> Ibid.

<sup>917</sup> Ibid.

<sup>918</sup> OCRE Interview Notes, Sally Whiltie (Mar. 3, 2020) (on file) (Ms. Whiltie consented to using her full name in the report).

<sup>919</sup> Ibid.

<sup>920</sup> Ibid.

prior job, at a hotel, and that she did not know how much she was making at MVLE but that the “checks were good.”<sup>921</sup> She did not recall any professional development opportunities at MVLE but also said that she did not want to change jobs at the moment.<sup>922</sup> She also told Commission staff that her hours are 2:00 – 6:30 p.m. Monday – Friday, she commutes by cab and METRO, she likes her work environment and wants to stay, and that she wants a job that she can walk to but enjoys being a custodian and is happy at MVLE.<sup>923</sup>

- Sonya Gooe, age 44, said she had been working at MVLE for three years, and that it was her first job. She told OCRE staff that she works at Greenspring retirement community five days a week, cleaning walls, caddies, chairs and windows, and refilling and cleaning the salt and pepper shakers.<sup>924</sup> She said she likes her work and likes the people a lot, and that she feels that she could talk to her supervisor about any problems.<sup>925</sup> She was not sure how much she was paid, but said that she had received a raise last year, and when her job coach asked if her pay was determined by time studies, she said yes.<sup>926</sup>
- J.A., age 42, told Commission staff that she had been working at MVLE for 19 years, and that it was her first job. Her duties include “silverware, [to] clean tables and trays in the café, clean and dry trays.”<sup>927</sup> When asked what she liked and disliked about her job, she only had positive things to say: “It’s nice. And I get paid and make some money, and that’s about it.”<sup>928</sup> She added that she likes the people she works with, who are two persons with disabilities and two without; and her job coach explained that he is one of the people who supports her.<sup>929</sup> Ms. A was not sure how much she makes or how MVLE determines her salary, although she did remember that she is making more than when she started.<sup>930</sup> She also stated that she had changed jobs, and previously worked in janitorial services, cleaning bathrooms and picking up trash.<sup>931</sup> She said her professional development included time studies, and that she had learned how to roll silverware.<sup>932</sup>

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<sup>921</sup> Ibid.

<sup>922</sup> Ibid.

<sup>923</sup> Ibid.

<sup>924</sup> OCRE Interview Notes, Sonya Gooe (Mar. 3, 2020) (on file) (Ms. Gooe consented to using her full name in the report).

<sup>925</sup> Ibid.

<sup>926</sup> Ibid.

<sup>927</sup> OCRE Interview Notes, J.A. (Mar. 3, 2020) (on file).

<sup>928</sup> Ibid.

<sup>929</sup> Ibid.

<sup>930</sup> Ibid.

<sup>931</sup> Ibid.

<sup>932</sup> Ibid.

- N.S, age 41, told Commission staff that he has been working at MVLE for 20 years. He explained that his job is delivering newspapers in the neighborhood every Thursday and Friday, and on Mondays, Tuesdays, and Fridays he picks up trash in the community, and on Wednesday he sees a speech therapist and goes to McDonald's.<sup>933</sup> Asked what he likes and dislikes about his job, he enthusiastically stated, "I love to do my job. It's what I do, going to different places. I love my job."<sup>934</sup> He did not know how much he is paid, and when asked how MVLE determines his pay, his job coach in the room said that he did time studies, and Mr. S agreed.<sup>935</sup> He said that his professional development opportunities consisted of learning how to do the papers and the trash, and that in the past he had rolled silverware.<sup>936</sup>
- Candice Smart, age 41, told staff that has worked at MVLE since 2004, doing custodial cleaning work such as mopping floors and cleaning bathrooms.<sup>937</sup> This was not her first job, as she previously worked at Fort Belvore hospital in guest services, washing dishes.<sup>938</sup> When asked what she liked and disliked about her job, Ms. Smart said: "I like my job. I like everyone around me. There's nothing about my job I don't like."<sup>939</sup> She added that she likes "making new friends" and "making a lot of money."<sup>940</sup> She reported that she makes \$13/hour and that she last received a raise in September 2019.<sup>941</sup>
- Robert Steven Opiela, a 39-year-old man, told staff that he has been working at MVLE for 13 years; however, he is now working as a courtesy clerk at a supermarket, where he assists customers with propane returns and exchanges, as well as gift cards.<sup>942</sup> Mr. Opiela said that he likes the people he works with, and likes that he can accept tips; but he does not like his chaotic work schedule as it is not a 9 to 5 job and that the "kiddie shopping carts are very frustrating."<sup>943</sup> When asked if he feels like he could talk to his supervisor or others about any problems, he said that he has not brought up scheduling as he has to talk to the

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<sup>933</sup> OCRE Interview Notes, N.S. (Mar. 3, 2020) (on file).

<sup>934</sup> Ibid.

<sup>935</sup> Ibid.

<sup>936</sup> Ibid.

<sup>937</sup> OCRE Interview Notes, Candice Smart (Mar. 3, 2020) (on file) (Ms. Smart consented to using her full name in the report).

<sup>938</sup> Ibid.

<sup>939</sup> Ibid.

<sup>940</sup> Ibid.

<sup>941</sup> Ibid.

<sup>942</sup> OCRE Interview Notes, Robert Steven Opiela (Mar. 3, 2020) (on file) (Mr. Opiela consented to using his full name in the report).

<sup>943</sup> Ibid.



person who makes the schedule.<sup>944</sup> He is not sure of his current wages, but says that they were cut by about \$4.50 an hour when he moved from his stock clerk position to his current position.<sup>945</sup> He found out about the opportunity to work at the supermarket about 11 months ago, through his job coach, and says that he feels comfortable talking to her about his interests and asking about other opportunities.<sup>946</sup> Mr. Opiela added that no one has trained him to be a bagger yet, but instead he has been advocating for himself to have more opportunities, and his job coach (who was in the room) told him that they can look into it.<sup>947</sup>

- D.R., a 38-year-old woman, said she has been working through MVLE for eleven years, but she also worked for nine years prior at MVLE at the retirement home in a group setting.<sup>948</sup> She has worked for the last year as a concierge clerk at a supermarket, assisting with carts, trash, and cleaning the break room.<sup>949</sup> When asked what she liked and disliked about her job, Ms. R. said everyone is nice, and that she can ask for help when needed; however, she does not like some aspects about her cleaning tasks and does not feel comfortable talking to her supervisor about this.<sup>950</sup> Ms. R said that she makes \$8.60 per hour and has not received a raise yet. She is interested in learning new skills to work in other departments at the supermarket and doing other tasks, such as stocking, and wants to talk to her job coach (who was in the room to support her during the interview) about this.<sup>951</sup>
- Amy Loi is a 34-year-old woman who told Commission staff that she has been working at MVLE for 10 years, and this is her first job. Ms. Loi said that work consists of putting stamps and labels on documents, as well as stuffing and folding, shredding papers, and typing.<sup>952</sup> She also participates in activities such as drama, signing, golf, swimming, football, and horseback riding.<sup>953</sup> When asked what she likes and dislikes about her job, she said that she likes “everything here,” including “hanging out with my friends.”<sup>954</sup> She also really enjoys serving at the farm-to-table barbeque hosted by MVLE every year, and

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<sup>944</sup> Ibid.

<sup>945</sup> Ibid.

<sup>946</sup> Ibid.

<sup>947</sup> Ibid.

<sup>948</sup> OCRE Interview Notes, D.R. (Mar. 3, 2020) (on file); *See also supra* notes 845-847 (tour of Greenspring).

<sup>949</sup> Ibid.

<sup>950</sup> Ibid.

<sup>951</sup> Ibid.

<sup>952</sup> OCRE Interview Notes, Amy Loi (Mar. 3, 2020) (on file) (Ms. Loi consented to using her full name in the report).

<sup>953</sup> Ibid.

<sup>954</sup> Ibid.

that her only dislike was that she would like to make more money.<sup>955</sup> Her job coach explained that she used to make piece meal wages, but that since the “flat rate from DOJ,” she now makes \$7.25 per hour.<sup>956</sup> She said that had opportunities to learn new skills through artwork, such as drawing and coloring.<sup>957</sup>

- R.G., a 26-year-old woman, told Commission staff that she has been working at MVLE since 2015, and that she worked in the “janitorial crew across the street” for about three years, and currently works from 9:00 – 2:00, Monday – Friday, cleaning tables, bathrooms, and taking out the trash.<sup>958</sup> When asked what she likes and dislikes, she said that she likes her job and making a paycheck, and commented, “just working is good.”<sup>959</sup> She said that she did not have any dislikes except that sometimes she dislikes doing the trash, and that she feels that she could talk to her supervisor about any problems she might have.<sup>960</sup> R.G. said she last received a raise towards the end of a contract that MVLE had with a church, which ended January 31, 2020.<sup>961</sup> When prompted by her job coach she said that MVLE talks to her about other types of jobs once a year when she has a meeting with staff; and she then commented that “it would be good to get another job. . . that would pay more money.”<sup>962</sup> When asked about skills development opportunities, she said she has had the opportunity to learn how to clean well.<sup>963</sup>
- The youngest person interviewed was Andrea Fontana, a 23-year-old woman.<sup>964</sup> She explained that she has worked at MVLE since September 2019, where she opens envelopes that are in boxes to check that all is there and then re-stuffs them, and she also types labels for the envelopes.<sup>965</sup> Ms. Fontana said she likes her job, and that “[i]t’s fun;” she could not think of anything she dislikes.<sup>966</sup> She is not sure how much she is paid, but she stated that if she works harder she makes more money, and if she works less she makes less money.<sup>967</sup> She was not clear if she had heard about other job opportunities, and commented that she

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<sup>955</sup> Ibid.

<sup>956</sup> Ibid.

<sup>957</sup> Ibid.

<sup>958</sup> Ibid.

<sup>959</sup> Ibid.

<sup>960</sup> Ibid.

<sup>961</sup> Ibid.

<sup>962</sup> Ibid.

<sup>963</sup> Ibid.

<sup>964</sup> OCRE Interview Notes, Andrea Fontana (Mar. 3, 2020) (on file) (Ms. Fontana consented to using her full name in the report).

<sup>965</sup> Ibid.

<sup>966</sup> Ibid.

<sup>967</sup> Ibid.

is “happy being here,” and when prompted by her job coach, she recalled that she had received training on making candles and explained how that is done.<sup>968</sup>

- Two of the employees with disabilities interviewed at MVLE wished to remain anonymous but consented to the Commission using their interview data. One was a 29-year-old woman.<sup>969</sup> She told Commission staff that she worked at MVLE for about two years, and that her duties include to “go out to community work sites, pick up trash, and clean up our environment,” as well as being an “assister” in “grounds cleaning.”<sup>970</sup> When asked what she liked and disliked about her work, she said that she likes MVLE, learning new skills, getting along with her peers, and “making money of course.”<sup>971</sup> She emphasized she needs money for savings and going to the mall, and that if she left MVLE for another opportunity she did not know how she would get transportation.<sup>972</sup> She dislikes what one of her peers has been doing, by grabbing her things and not being able to get along with her and that “she caused me drama.”<sup>973</sup> Her job coach was in the room supporting her, and confirmed that she could talk to her job coach about it.<sup>974</sup> She does not know when she last received a raise, but confirmed that her pay is set by time studies, and that she has received skills development opportunities through a video that covered new types of jobs such as stocking shelves.<sup>975</sup>
- The other person wishing to remain anonymous was a 24-year-old man who has been working at MVLE for one year cleaning, clearing and wiping down tables, and taking out trash and recycling.<sup>976</sup> He said his job is “great,” and that he likes “getting paid,” and “meeting new best friends.”<sup>977</sup> He had experienced being hugged by another employee in a way that made him uncomfortable, but told Commission staff that he told his supervisor and that she was helpful in addressing the issue, and had asked if it was the only time and he confirmed that it was.<sup>978</sup> Commission staff noted that his mother as well as the site manager (who were both in the room with him for support) were aware of the incident.<sup>979</sup> When asked if he had heard about other job opportunities from MVLE, he said he watched

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<sup>968</sup> Ibid.

<sup>969</sup> OCRE Interview Notes, Anonymous #1 (Mar. 3, 2020) (on file).

<sup>970</sup> Ibid.

<sup>971</sup> Ibid.

<sup>972</sup> Ibid.

<sup>973</sup> Ibid.

<sup>974</sup> Ibid.

<sup>975</sup> Ibid.

<sup>976</sup> OCRE Interview Notes, Anonymous #2 (Mar. 3, 2020) (on file).

<sup>977</sup> Ibid.

<sup>978</sup> Ibid.

<sup>979</sup> Ibid.

a video about stocking shelves in a department store and was also “showed lots of jobs.”<sup>980</sup> He said he is happy at MVLE and he is learning new skills such as cleaning dishes and folding napkins into different shapes.<sup>981</sup>

### *Arizona*

The Commission studied Arizona as an example of a state that allows the payment of subminimum wages, but also has a statewide Employment First policy. In 2017, Arizona Governor Douglas A. Ducey established Employment First as the official state policy for employment of people with disabilities by executive order.<sup>982</sup> In October 2019, the Arizona State Advisory Committee to the Commission held a briefing on Subminimum Wages for People with Disabilities featuring Arizona state officials, academics, advocates, service providers and employers of people with disabilities, and family members of people with disabilities, so the Commission was aware that there was some local concern focused on the topic.<sup>983</sup> The briefing also featured an open public comment session after the expert testimony had concluded.<sup>984</sup>

During the October 2019 briefing in Arizona, the Advisory Committee reported that the State of Arizona allowed payment of subminimum wages to people with disabilities through 14(c) certificates; and in January 2020, the Department of Labor reported that there were 43 employers who held 14(c) certificates in the state.<sup>985</sup>

In 2015-2016, only 15 percent of people with disabilities in Arizona were employed in an integrated setting.<sup>986</sup> In 2016, 34.82 percent of all people with disabilities in Arizona were employed in all employment settings (both segregated and integrated).<sup>987</sup>

As of January 2020, according to data provided by the Wage and Hour Division, of the 43 employers who had applied for 14(c) entities in Arizona, 21 certificates had been issued and 22

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<sup>980</sup> Ibid.

<sup>981</sup> Ibid.

<sup>982</sup> Ariz. Exec. Order No. 2017-08, “The Establishment of Arizona as an Employment First State” (Nov. 15, 2017) [https://azgovernor.gov/sites/default/files/excutive\\_order\\_2017-08\\_employment\\_first\\_state\\_0.pdf](https://azgovernor.gov/sites/default/files/excutive_order_2017-08_employment_first_state_0.pdf).

<sup>983</sup> Briefing Before the Arizona Advisory Committee to the U.S. Comm’n on Civil Rights, Phoenix, AZ, Oct. 18, 2019.

<sup>984</sup> Ibid.

<sup>985</sup> U.S. Dep’t of Labor, Wage and Hour Division, *14(c) Certificate Holders*, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders> (last accessed May 24, 2020).

<sup>986</sup> UMass Boston, Institute for Community Inclusion, StateData.info, *State Employment Snapshot: Arizona*, <https://www.statedata.info/statepages/Arizona> (last accessed Feb. 10, 2020).

<sup>987</sup> The LEAD Center DRIVE Data and Resources to Inspire a Vision of Employment, *Arizona*, [http://drivedisabilityemployment.org/arizona#quicktabs-states\\_big\\_screen=1](http://drivedisabilityemployment.org/arizona#quicktabs-states_big_screen=1) (last accessed Feb. 14, 2020).

were pending.<sup>988</sup> But because certificates expire 1-2 years after they are issued, and are issued on a rolling basis following the original date of application, they are issued at different times, and therefore the data is a “snapshot.”<sup>989</sup> However, the pending applications for renewal remain in effect, thus the data show that all 43 sites in Arizona are permitted to be operational.<sup>990</sup>

Also in Arizona, the majority (38 of the 43 or 88.4%) of 14(c) certificate holders were Community Rehabilitation Programs, although some appear to have dual programs as two of those reported to the Wage and Hour Division that they are also a School Work Experience Program, and one also reported being a Business Establishment.<sup>991</sup> Applying national data about subminimum wage employment shows that the great majority of persons employed in 14(c) workshops in Arizona are likely to be persons with intellectual and developmental disabilities.<sup>992</sup>

During the Arizona briefing, Susan Voirol, program manager at the Sonoran University Center for Excellence in Developmental Disabilities, testified to the importance of ensuring that all individuals with disabilities have an informed choice when it comes to understanding their employment options.<sup>993</sup> Voirol also testified to the importance of strengthening Arizona’s supported employment strategies, including financial investments in building support infrastructure.<sup>994</sup> Between 2014 and 2016, Arizona increased state funding for integrated employment services for people with intellectual and developmental disabilities from \$18,489,000 in 2014 to \$24,550,418 in 2017.<sup>995</sup>

Proponents of continuing to allow 14(c) certificates also testified before the Arizona State Advisory Committee, proposing reforms to the 14(c) certificate program including greater

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<sup>988</sup> U.S. Dep’t of Labor, Wage and Hour Division, *14(c) Certificate Holders*, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders> (last accessed March 23, 2020).

<sup>989</sup> Wage and Hour Division, Response to USCCR Interrogatory No. 9 at 4-5; Wage and Hour Division, Field Operations Handbook Chapter 64 § 64d01(a) (“Work Center and Patient Worker certificates are issued for 2-year periods. Business Establishment (Special Worker) certificates, including SE and SWEP certificates, are issued for a 1-year period.”); *See supra*, Notes 457-466.

<sup>990</sup> 29 C.F.R. § 525.13(b) (“If an application for renewal has been properly and timely filed, an existing special minimum wage certificate shall remain in effect until the application for renewal has been granted or denied”).

<sup>991</sup> U.S. Dep’t of Labor, Wage and Hour Division, *14(c) Certificate Holders*, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders> (last accessed March 23, 2020).

<sup>992</sup> *See supra* notes 448-449.

<sup>993</sup> Susan Voirol, testimony, *Briefing Before the Arizona Advisory Committee to the U.S. Comm’n on Civil Rights, Phoenix, AZ*, Oct. 18, 2019, transcript pp. 55-56 (hereinafter cited as *Arizona Briefing*); *see also supra* notes xx-xx (discussion of informed choice).

<sup>994</sup> Voirol Testimony, *Arizona Briefing*, pp. 69-70.

<sup>995</sup> StateData.info, *Arizona: Integrated employment funding*, <https://www.statedata.info/data/showchart/727721> (last accessed March 23, 2020).

oversight by the U.S. Department of Labor, reexamining who is eligible to work under a 14(c) certificate, and imposing limits on use of 14(c) employment to ensure that it is a training program and not an end destination for employment.<sup>996</sup> One employer in Arizona testified in support of the elimination of sheltered employment settings, but not the elimination of Section 14(c), arguing that people working for subminimum wages experience limited progress and the ineffectiveness of sheltered employment in developing employment skills for people with disabilities.<sup>997</sup> The employer stated:

Our concern lies in the possibility of elimination of the 14(c) certificate as an option for individuals who have chosen to work in community-based work crew group settings. We believe that the elimination or phasing out of the special minimum wage may result in many of the individuals that we, as well as other community service agencies, serve receiving no wages at all instead of the special minimum wage and thus denying them both the tangible and intangible benefits of working.<sup>998</sup>

Rickey Williams, a parent of a person with a disability who works in a sheltered workshop, testified before the Arizona State Advisory Committee about the benefits his daughter receives from working beyond a paycheck, stating that:

I can only imagine the negative effect on Sarah if she had no job. Her friends are at work, and she likes to be busy. She doesn't like it during those occasional occurrences during work when she has downtime. In addition, long weekends are difficult for her.

Two things are especially important to her at Beacon: the social interaction she has with peers and the structure Beacon gives to her life. Money takes a very distant third place.<sup>999</sup>

After the Commission's national briefing, several persons from Arizona also submitted public comments. One commenter, a parent of a person with a disability provided a detailed account of his daughter's wages and the company's operating costs along with an analysis of her projected negative impact of raising wages.<sup>1000</sup> Another comment was from the sister of a person with a disability, who explained how her sister has worked in a sheltered workshop for 37 years, and stating that some people will not be able to excel in a competitive integrated work environment.<sup>1001</sup>

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<sup>996</sup> Mark Jacoby, Testimony, *Arizona Briefing*, pp. 87-91.

<sup>997</sup> Jennifer Baier, Testimony, *Arizona Briefing*, p. 95.

<sup>998</sup> Jennifer Baier, Testimony, *Arizona Briefing*, pp. 95-96.

<sup>999</sup> Williams Testimony, *Arizona Briefing*, p. 145.

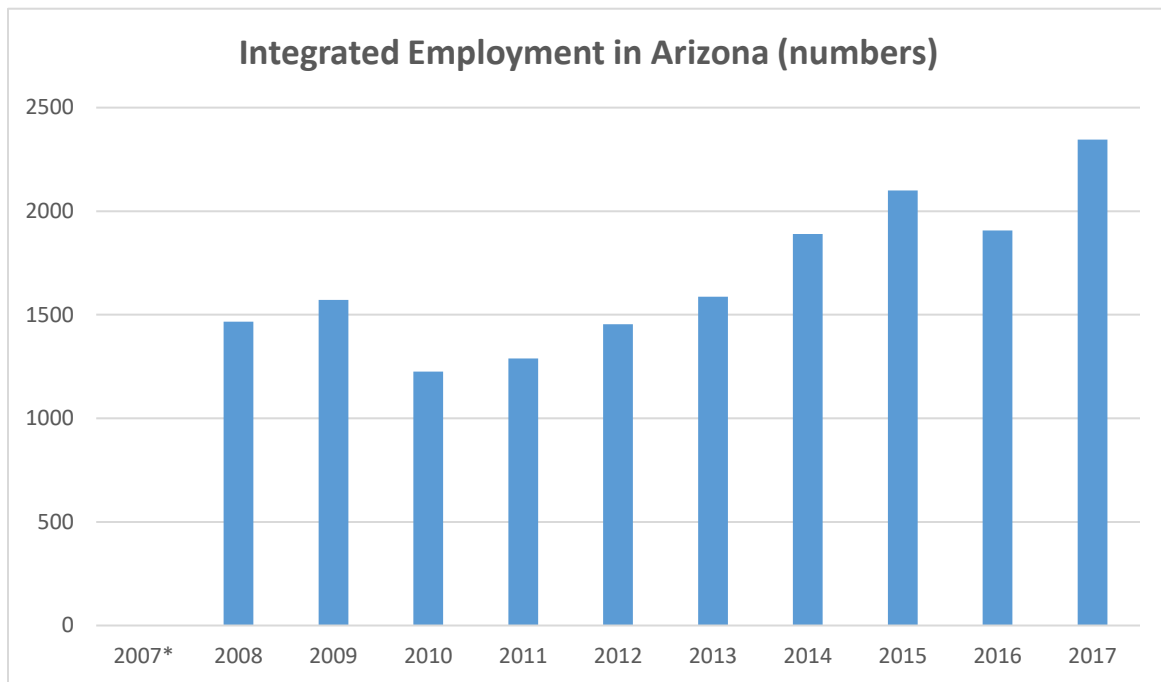
<sup>1000</sup> Public Comment No. 1,251 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>1001</sup> Public Comment No. 820 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

Among the 16 public comments received from Arizona, two were in favor of repealing Section 14(c). The mother of a 17-year-old daughter in Arizona wrote that she supports the end of subminimum wages. The mother stated that her daughter has ambitions to hold a mainstream job, and that she should be paid the same as her non-disabled peers.<sup>1002</sup> An advocate from Arizona also commented to the Commission that 14(c) should be eliminated because data shows that workers with disabilities want to and can work in competitive integrated employment, earning the same wages as workers without disabilities.<sup>1003</sup>

The number of persons with cognitive disabilities (about whom there is more data than exists for other disability categories) employed in integrated settings over time in Arizona is set forth below.

**Chart 4.6: Number of Individuals with Cognitive Disabilities working in Integrated Employment, Arizona (2007-2017)**



Source: UMass Boston, Institute for Community Inclusion, Statedata.info, “State IDD Agencies: Arizona,” <https://www.statedata.info/data/showchart/241868>

\*Indicates data are not available for that year

Based on Arizona state data from 2015 and 2016 collected by University of Massachusetts’ Institute for Community Inclusion, people with disabilities working in individual jobs in integrated settings earned an average of \$258.35 on a biweekly basis, and worked an average of 27.2 hours

<sup>1002</sup> Public Comment No. 1,345 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>1003</sup> Public Comment No. 567 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

over a two week period.<sup>1004</sup> Although the hours are low (only an average of 13.6 hours/week), on average, the pay amounts to \$10.53/hour.<sup>1005</sup> This hourly pay tracks approximately with minimum wage, as in January 2019, the minimum wage in Arizona was increased by 50 cents/hour to \$11.00/hour.<sup>1006</sup>

In contrast to the 15 percent working in integrated settings, there is no comparable data about the wages of other persons with disabilities in 14(c) programs in Arizona.

During the Arizona State Advisory Committee briefing Eva Hamant testified regarding the importance of choice for people with disabilities who are looking for integrated employment, stating that:

Just because a person decides they don't like the job that the agency has for them, they are a fact -- the fact they are working at a job and change their mind about that job, they should be able to have another inclusive job. I mean, how many of you have had multiple jobs and that became your choice? Why can't people with disabilities also have a choice in what kind of job they have out in the community?<sup>1007</sup>

April Reed, Vice President of Advocacy at Ability 360 in Arizona, testified to the Arizona Committee about steps that can be taken to support entities in providing greater integrated employment opportunities for people with disabilities, stating that:

As a center for independent living, we often hear from consumers with developmental disabilities and their families about the successes and challenges of employment. We continue to hear from our consumers that state agencies and staff they work with need more training opportunities to learn how to support and effectively work with people with cognitive and intellectual disabilities.

We hear that current system policies and procedures support segregation, not self determination. Consumers and families report that some languish in an endless cycle of skills training with few moving to community employment. Our consumers want opportunities for customized employment that takes into account their interests, their goals and their skills.

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<sup>1004</sup> UMass Boston, Institute for Community Inclusion, StateData.info, *State Employment Snapshot: Arizona*, <https://www.statedata.info/statepages/Arizona> (last accessed Feb. 10, 2020); *C.f. supra*, notes 474-475 (describing national average employment outcomes for people with disabilities).

<sup>1005</sup> \$258.35/27.2 hours = \$10.53/hour.

<sup>1006</sup> Az. Code Art. 8 § 23-363 (setting the minimum wage at \$11.00/hour as of Jan. 2019 and \$12.00/hour as of Jan. 1, 2020).

<sup>1007</sup> Hamant Testimony, *Arizona Briefing*, p. 152.



We also hear from youth and their families that while more transition services are available in our state, there is still a need for additional community based opportunities for paid and unpaid vocational experience for youth. We hear that families need more in depth and early transition planning services.<sup>1008</sup>

### *Missouri*

The Commission reviewed the state policies regarding 14(c) in Missouri because it is currently the only state with 14(c) programs that is not reliant on any federal funding. During the course of the Commission’s investigation, the Commission received submissions from advocates, family members, and lawmakers in Missouri. The Commission received a report by A-Team Missouri, an advocacy group, entitled *Sheltered Workshop Data/Outcomes Report, Issued to the U.S. Commission on Civil Rights*.<sup>1009</sup> The report states that Missouri’s 87 14(c) sheltered workshops are “very different compared to those throughout the nation,” and that “the most compelling difference is that Missouri workshops do not receive any federal Funding.”<sup>1010</sup> Instead, Missouri’s 87 workshops rely on sales revenue, funding through the Missouri Department of Elementary and Secondary Education, funding through local property taxes, or fundraising through grants, private donations, and/or events.<sup>1011</sup> Those that receive state funding are required to receive annual certification, and the *Sheltered Workshop Data/Outcomes* report states that the state education agency “conducts thorough audits of each workshop,” and that “Missouri has strict guidelines” that surpass the federal Workforce Innovation and Opportunity Act requirements regulating the hiring of persons with disabilities under the age of 25.<sup>1012</sup>

The Commission verified that Missouri law “requires that all persons, regardless of age, be certified by the [Missouri Department of Elementary and Secondary Education] which includes an assessment of whether placement in a sheltered workshop is appropriate for that person.”<sup>1013</sup> But regarding the amount of pay, Commission analysis of Department of Labor data found that 53 investigations of 14(c) certificate holders in Missouri resulted in violations between 2009 and 2020, resulting in back wages ordered totaling \$781,105.72.<sup>1014</sup>

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<sup>1008</sup> Reed Testimony, *Arizona Briefing*, p. 128.

<sup>1009</sup> A Team and Dignity Has a Voice, *Sheltered Workshop Data/Outcomes Report, Issued to the U.S. Commission on Civil Rights* (Dec. 11, 2019) (on file).

<sup>1010</sup> *Ibid.*, 1.

<sup>1011</sup> *Ibid.*

<sup>1012</sup> *Ibid.*

<sup>1013</sup> *Ibid.*; See Mo. Code Regs. Tit. 5, § 20-300.190.

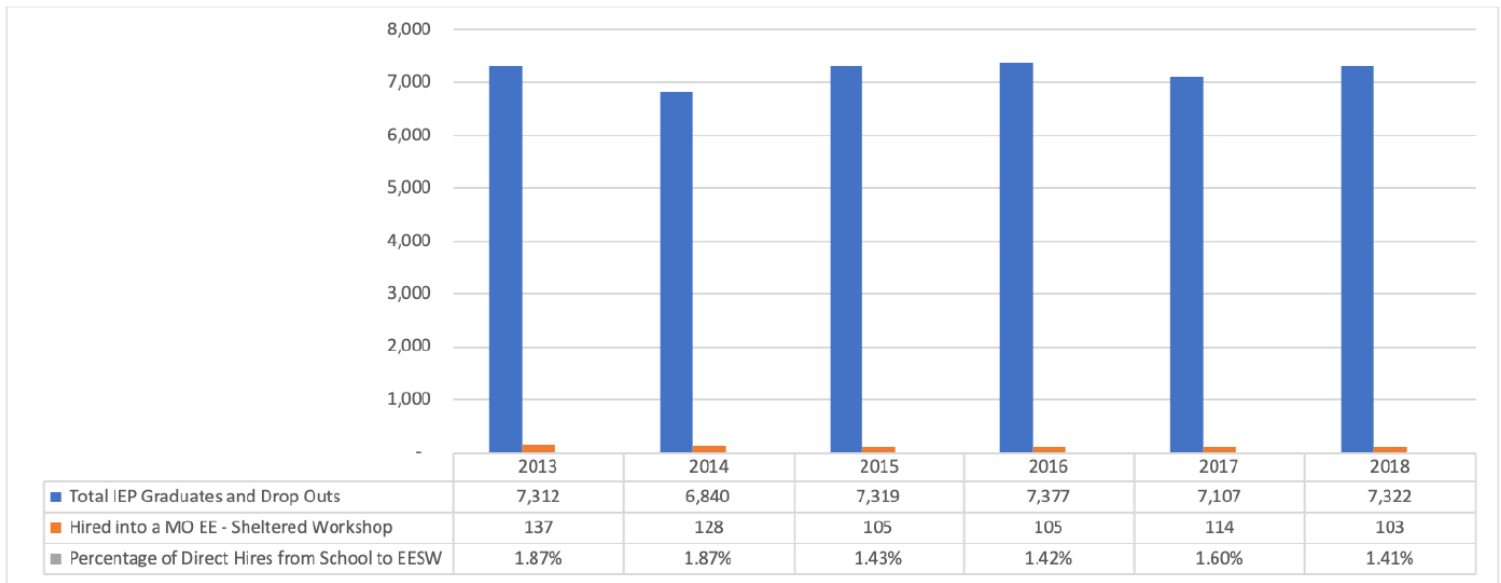
<sup>1014</sup> Data from U.S. Dep’t of Labor, Data Enforcement, <https://enforcedata.dol.gov/homePage.php> (last accessed May 25, 2020) (Of the 53 investigations with violations, one entity was found to be in violation on three separate occasions, and two entities were found to be in violation on two separate occasions).

The report *Sheltered Workshop Data/Outcomes* emphasizes that Missouri’s more enhanced and individualized certification process has led to declining numbers of persons with disabilities working in sheltered workshops, stating that:

The most impressive Missouri statistic is that only 1.60% (last 6-year average) of Missouri high school seniors who had an individualized education plan (IEP) chose extended employment sheltered workshop services at their graduation or when leaving school (SEE [Chart 4.6]). To put it into perspective, in 2018 that was only 103 out of 7,322 students.

This trend was the same pre-[Workforce Innovation and Opportunity Act] because Missouri’s focus has always been on providing people with disabilities the training and information necessary for them to succeed at their personal level. In Missouri, all departments and agencies collaborate and work together, including Vocational Rehabilitation (VR), to ensure a continuum of employment options and services for people with disabilities. A good example of this is that Missouri was the first state in the country to comply with Section 511 of WIOA. This was possible because many of the requirements outlined in Section 511 were already in place in our state.<sup>1015</sup>

**Chart 4.7: Total Students in Missouri with and Individualized Education Plan vs. Number of Students Hired Directly into a Sheltered Workshop (2013-2018)**

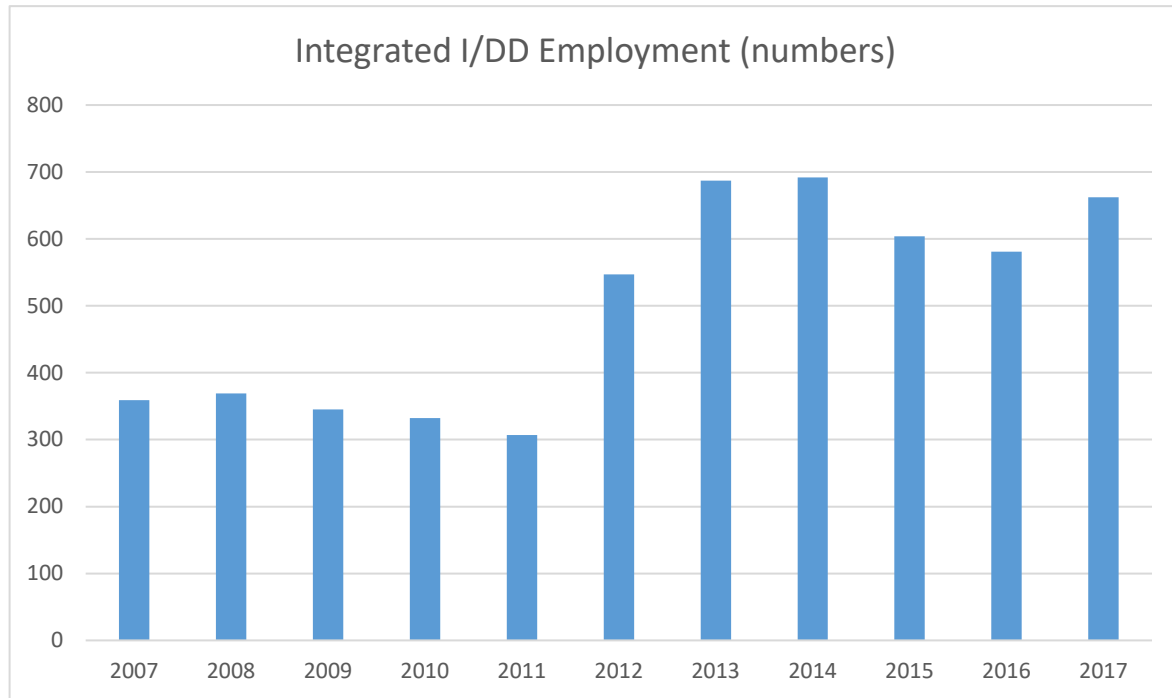


Source: Sheltered Workshop Data/Outcomes Report, p. 2.

Commission research also shows that the number of people with cognitive disabilities working in integrated settings in Missouri has been increasing over time:

<sup>1015</sup> Sheltered Workshop Data/Outcomes Report, pp. 1-2.

**Chart 4.8: Number of Individuals with Cognitive Disabilities working in Integrated Employment, Missouri (2007-2017)**



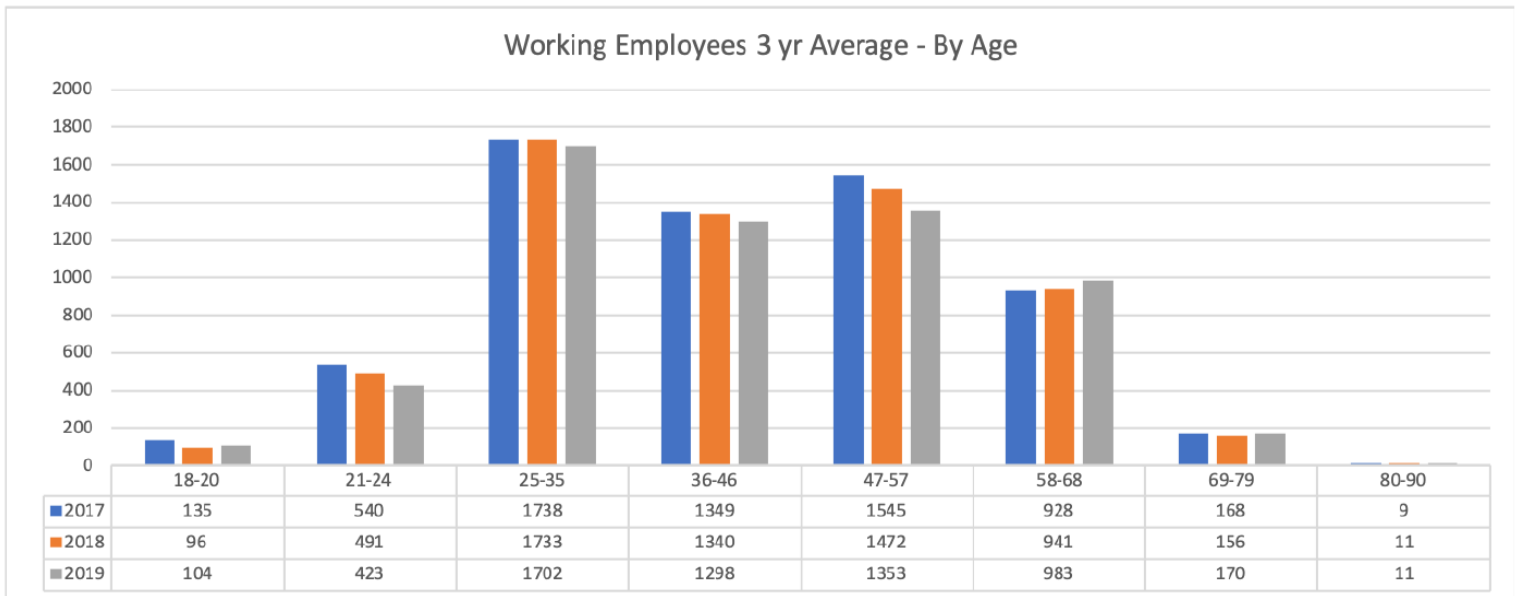
Source: UMass Boston, Institute for Community Inclusion, Statedata.info, “State IDD Agencies: Missouri,” <https://www.statedata.info/data/showchart/105298>.

The A-Team report also stated that while the number of persons working in sheltered workshops is declining, “Missouri also recognizes that community employment is not the most appropriate or desired option for every person with a disability and values sheltered workshops as a vital employment option.”<sup>1016</sup> The report asserts that the data provided shows that a number of young adults with disabilities choose sheltered workshops as their place of employment, and cites the following data:

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<sup>1016</sup> Ibid., 2.

**Chart 4.9: Number of Employees with Disabilities Working in Missouri by Age (2017-2019)**



Source: A Team and Dignity Has a Voice, Sheltered Workshop Data/Outcomes Report, Issued to the U.S. Commission on Civil Rights, at 3, GRAPH C (Dec. 11, 2019) (on file).

The A-Team and Dignity Has a Voice also stated that “no one in Missouri is forced to work at a sheltered workshop,” because people with disabilities leaving secondary or postsecondary education must be certified by the state Department of Education as being appropriate for placement, and they can quit at any time.<sup>1017</sup> They added that in 2017, of the 29,465 Missouri residents who worked with a Vocational Rehabilitation counselor, only 5,010 (less than 17%) successfully obtained and retained community integrated employment or supported employment.<sup>1018</sup> The report provides data about the results of counseling under the rules of the federal Workforce Innovation and Opportunity Act, which has led to few job placements in Missouri, but it does not provide data about the results of more aggressive Vocational Rehabilitation required by the state.

Regarding the issue of choice, the Missouri A-Team advocates stated that:

We firmly believe that no one has the right to tell another person what is best for them. Nor do they have the right to tell a parent, who has spent a lifetime caring for and supporting their son or daughter, what is best for their child. Lawmakers, along with disability rights

<sup>1017</sup> Ibid., 3.

<sup>1018</sup> Ibid., 3.

groups, increasingly make these decisions without talking to the people who will be directly impacted.<sup>1019</sup>

At the Commission’s briefing, Tracy Gritsenko spoke during the public comment session, stating that she represented over 6,000 families who make up A-Team Missouri.<sup>1020</sup> Gritsenko stated that while 14(c) is not appropriate for all persons with disabilities, “all disabilities are not the same,” that “it is imperative that we not force a one-size fits all solution,” and that removal of 14(c) “would eliminate a vital employment options for hundreds of thousands of Americans, leaving many of them sitting at home or relegated to day hab [rehabilitation] programs.”<sup>1021</sup> She added that:

And to be clear, our families do not believe that sitting at home or in a day hab program is an appropriate or desired option for their loved ones. Persons who choose this type of employment for themselves or their loved ones are continually learning new job skills and social skills, making friends, and yes, earning a paycheck....

Our programs provide an atmosphere that allows individuals to build on their self-esteem and confidence by focusing on their abilities, not their disabilities. This work environment meets them exactly where they are and provides them with supports and, if needed, protections, to enable them to succeed in a safe, supported, and understanding atmosphere.

For hundreds of thousands of Americans, this is their informed, intentional choice. And we must honor their right to choose what is best for them or their loved ones.<sup>1022</sup>

Of the 9,727 public comments received, 360 (3.7%) were from Missouri, including many (65 or 18%) sent by A-Team. Sixty-eight (68) were from persons with disabilities, and a larger number (137) of the commenters were from family members of persons with disabilities working in 14(c) workshops or their family members who stated it was their “CHOICE” to work there and that they were against elimination of the 14(c) program.<sup>1023</sup> For example, one family member of a person with a disability working at Lafayette Industries in Missouri wrote in a public comment that:

The focus on wages ignores the larger picture. We are NOT concerned with lower pay. We ARE concerned that the rights of our *family member* to work in a fulfilling, safe, stable job where he enjoys being part of a community is at risk due to the wage debate. The companies

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<sup>1019</sup> Ibid., 8.

<sup>1020</sup> Gritsenko Testimony, *Subminimum Wages Briefing*, pp. 344-45.

<sup>1021</sup> Ibid., 345.

<sup>1022</sup> Ibid.

<sup>1023</sup> Emphasis in original. The Commission also received a large number of public comments from the A-Team in Pennsylvania (880). Like Missouri, Pennsylvania permits 14(c) workshops and those who wrote to the Commission are against eliminating the program.

that give work to Lafayette provide much more than a salary for people with I/DD. They provide an opportunity for an enriching life. This is our right. This is our choice.<sup>1024</sup>

The Commission also received letters from six state and federal legislators from Missouri. U.S. Congressional Representative Sam Graves (R-MO) stated that 14(c) provides sheltered workshops in his district “with the means to create new jobs and contribute to the professional growth of individuals who are often faced with a select number of employment options when joining the workforce;” and that “it is my hope that discussions to eliminate 14(c) are met with the utmost scrutiny and the understanding that a one-size-fits-all approach is often not the best approach given the fact that each state’s program is unique.”<sup>1025</sup> U.S. Congresswoman Vicki Hartzler (R-MO) also wrote to the Commission in support of 14(c), stating that “Section 14(c) provides employment choices for families, practical work experience for disabled individuals, and meaningful employment opportunities.”<sup>1026</sup> Hartzler asked the Commission to consider “the benefits and uniqueness of Missouri’s program,” which does not receive any federal funding, has workshops that “collaborate seamlessly with other agencies to ensure access to a continuum of employment and other services” for persons with disabilities, has complied with Section 511 of the Workforce Innovation and Opportunity Act, with workshops that are independently owned and operated businesses that do not resemble day programming, and rather “employees [are] allowed to participate in work at their individual pace and with both staff and peer support.”<sup>1027</sup> She also emphasized that Missouri’s sheltered workshops are steppingstones that for some, may represent “their only opportunity to gain work experience in order to seek competitive employment.”<sup>1028</sup> However, the data from the Missouri A-Team and Dignity Has a Voice report shows that less than 0.1 percent of people working in sheltered workshops who received Section 511 counseling in Missouri found competitive integrated employment.<sup>1029</sup>

Another Republican Congressman from Missouri, Billy Long, also sent a letter to the Commission expressing the same points as his two colleagues, and added that there isn’t enough data to determine whether 14(c) should be eliminated.<sup>1030</sup> He added that he meets with “many constituents” from his district “who praise sheltered workshops, which provide dignified

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<sup>1024</sup> Public Comment No. 1,161 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights. (emphasis in original).

<sup>1025</sup> Letter from Rep. Sam Graves to U.S. Commission on Civil Rights (Jan. 10, 2019) [sic] (on file).

<sup>1026</sup> Letter from Rep. Vicki Hartzler to U.S. Commission on Civil Rights (Dec. 12, 2019) (on file).

<sup>1027</sup> Ibid.

<sup>1028</sup> Ibid.

<sup>1029</sup> A Team and Dignity Has a Voice, *Sheltered Workshop Data/Outcomes Report, Issued to the U.S. Commission on Civil Rights*, p. 5 (Dec. 11, 2019)(on file) (in 2017, 11/6,744 (0.16%) persons with disabilities working in sheltered workshops in Missouri who received 511 counseling found competitive integrated employment, and in 2018, only 1 out of 6,712 found employment).

<sup>1030</sup> Letter from Rep. Billy Long to U.S. Commission on Civil Rights, p. 1 (Dec. 11, 2019) (on file).

employment options with the necessary skills with those with disabilities to succeed. No family wants fewer options when deciding how to help their child with disabilities succeed. That is why the 14(c) provision provides more options, especially for those who may not ‘fit’ or desire Vocational Rehabilitation services or Medicaid Waiver services.”<sup>1031</sup> Long “ask[s] that 14(c) be left intact pending further examination and that this vital component to a full variety of employment options remain available.”<sup>1032</sup>

U.S. Representative Emanuel Cleaver (D-MO), also wrote to the Commission stating that sheltered workshops in his district, which is made up of urban, suburban and rural areas, reached out to him about the importance of Section 14(c).<sup>1033</sup> He stated that he “supports the mission and efforts of the sheltered workshops in my district.”<sup>1034</sup> Specifically, Congressman Cleaver told the Commission:

In many of the rural towns in my district, sheltered workshops are essential to disabled individuals’ feelings of dignity, self-worth and of being able to contribute to their communities. My staff and I have visited sheltered workshops, such as Richmond and Higginsville, and have seen first hand the importance of the disabled individual’s ability to get up every morning and go to work with their friends.

Most of the towns in the rural areas of the 5<sup>th</sup> District and all of Missouri do not have the job opportunities or public transportation for disabled individuals. Section 14(c) programs provide transportation for employees. Many rural community jobs for these workers are part-time if available. Most programs that use Section 14(c) provider [*sic.*] closer to full time hours. Do not discount what this means to families. If the person with disability has shorter hours per week or no job at all, this means that another family member cannot work in order to be the caretaker.<sup>1035</sup>

The data from the Congressman’s letter suggests that lack of public transportation and employment opportunities may contribute to over-reliance on 14(c) sheltered workshops that pay subminimum wages to persons with disabilities in his state. The Americans with Disabilities Act requires that employment opportunities and public transportation be reasonably accessible to persons with disabilities.<sup>1036</sup>

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<sup>1031</sup> Ibid.

<sup>1032</sup> Ibid.

<sup>1033</sup> Letter from Rep. Emanuel Cleaver to U.S. Commission on Civil Rights (Dec. 15, 2019) (on file).

<sup>1034</sup> Ibid.

<sup>1035</sup> Ibid.

<sup>1036</sup> 42 U.S.C. § 12111 *et seq.*

Missouri State Senator Gary Romine, and State Representatives Mike Henderson and Dale Wright also wrote to the Commission in favor of 14(c) workshops in their state.<sup>1037</sup> The letters from the State Representatives were identical in their text, and stated that over 6,000 persons employed in sheltered workshops in their state “would no longer have a job if 14(c) is eliminated.”<sup>1038</sup> They also emphasized that Missouri workshops do not receive federal funds and are independently owned and operated, adding that: “Eliminating 14(c) would put an end to Missouri’s Sheltered Workshops and the thousands of Missourians they employ would be forced into day programs costing the state millions.”<sup>1039</sup>

## **State Initiatives to Phase Out Subminimum Wages Permitted under Section 14(c) of the Fair Labor Standards Act**

### *Overview of States that Are Eliminating or Have Eliminated Subminimum Wages*

This section examines policies in states that are phasing out both subminimum wages and sheltered workshops. As discussed in Chapter 2 of this report, the final report of the Advisory Committee on Increasing Competitive Integrated Employment recommended that state officials should familiarize themselves with the resolution agreements obtained by the U.S. Department of Justice in Rhode Island<sup>1040</sup> and Oregon<sup>1041</sup> to better inform service system changes to decrease the use of segregated employment services and to increase competitive integrated employment for people with disabilities.<sup>1042</sup> Additionally, the final report recommends that state agencies should adopt uniform service standards of professional competence in supporting competitive integrated employment and support the development of career professionals to manage and run state

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<sup>1037</sup> Email of State Sen. Gary Romine to U.S. Commission on Civil Rights (Dec. 11, 2019); Letter of State Rep. Dale Wright to the U.S. Commission on Civil Rights (Dec. 4, 2019); Letter of State Rep. Mike Henderson to the U.S. Commission on Civil Rights (Dec. 5, 2019) (all on file) (letters of State Representatives were identical in their text).

<sup>1038</sup> Letter of State Rep. Dale Wright to the U.S. Commission on Civil Rights (Dec. 4, 2019); Letter of State Rep. Mike Henderson to the U.S. Commission on Civil Rights (Dec. 5, 2019) (both on file; both identical in their text).

<sup>1039</sup> Email of State Sen. Gary Romine to U.S. Commission on Civil Rights (Dec. 11, 2019); Letter of State Rep. Dale Wright to the U.S. Commission on Civil Rights (Dec. 4, 2019); Letter of State Rep. Mike Henderson to the U.S. Commission on Civil Rights (Dec. 5, 2019) (all on file) (letters of State Representatives were identical in their text).

<sup>1039</sup> Letter of State Rep. Dale Wright to the U.S. Commission on Civil Rights (Dec. 4, 2019); Letter of State Rep. Mike Henderson to the U.S. Commission on Civil Rights (Dec. 5, 2019) (both on file; both identical in their text).

<sup>1040</sup> 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>.

<sup>1041</sup> Settlement Agreement, *Lane v. Brown*, No. 3:12-cv-00138 (D. Ore. 2013), [https://www.ada.gov/olmstead/documents/lane\\_sa.pdf](https://www.ada.gov/olmstead/documents/lane_sa.pdf).

<sup>1042</sup> Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, p. 15 (Sept. 2016) [https://www.dol.gov/odep/topics/pdf/ACICIEID\\_Final\\_Report\\_9-8-16.pdf](https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf).



employment services for people with disabilities.<sup>1043</sup> These components of programs to increase competitive integrated employment are generally known as “Employment First” policies.<sup>1044</sup>

Four states that have Employment First policies have also abolished or are in the process of phasing-out the payment of subminimum wages to people with disabilities. These are: New Hampshire in 2015,<sup>1045</sup> Maryland in 2016,<sup>1046</sup> Alaska in 2018,<sup>1047</sup> and Oregon in 2019.<sup>1048</sup> Texas prohibited Community Rehabilitation Programs with state contracts from paying subminimum wages in 2019.<sup>1049</sup> Vermont<sup>1050</sup> and Maine<sup>1051</sup> have ended the use of subminimum wage through changes in state funding structures for employment programs that support people with disabilities.

Funding structures can have an impact on how these programs function. The Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities found that disparities in the number of people with disabilities working in competitive integrated employment across states can partially be explained by differing funding structures to offer services.<sup>1052</sup> The Committee explained that the manner in which states apply for and use Home and Community Based Services Waivers from the Centers for Medicare & Medicaid Services can have an unintentional impact on the number of people with disabilities employed in competitive integrated employment. What results across states is a mix of services including “sheltered employment, facility-based day services, non-facility-based day services, group employment, and individual supported or customized employment.”<sup>1053</sup> It is important to bear in mind that these iterations of

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<sup>1043</sup> Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, p. 18 (Sept. 2016) [https://www.dol.gov/odep/topics/pdf/ACICIEID\\_Final\\_Report\\_9-8-16.pdf](https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf).

<sup>1044</sup> See *supra* notes 406-432 (describing the major elements of Employment First policies); and see Figure ES.1 (map of states that have adopted various iterations of Employment First policies).

<sup>1045</sup> N.H. Code Ann. Tit. 23 § 279:22.

<sup>1046</sup> Md. Code Ann. Tit. Labor and Employment § 3-414.

<sup>1047</sup> Alaska Code Ann. Tit. 8 § 15.120.

<sup>1048</sup> Or. Code Ann. Tit. 16 § 653.030.

<sup>1049</sup> Tex. Code Ann. Tit. 8 § 122.0075-0076.

<sup>1050</sup> Vermont does not allow funding of services that pay people with disabilities a subminimum wage. See Vermont Agency of Human Services, Department of Disabilities, Aging and Independent Living, *State System of Care Plan for Developmental Disabilities Services*, pp. 62-64 (Oct. 2017) [https://ddsd.vermont.gov/sites/ddsd/files/documents/Vermont\\_DS\\_State\\_System\\_of\\_Care\\_Plan\\_0.pdf](https://ddsd.vermont.gov/sites/ddsd/files/documents/Vermont_DS_State_System_of_Care_Plan_0.pdf).

<sup>1051</sup> The State of Maine only permits Medicaid funds to be used to pay for integrated employment support services; See, State of Maine Department of Health and Human Services, *MaineCare Benefits Manual*, §§ 21, 29 <https://www.maine.gov/sos/cec/rules/10/ch101.htm>. Maine’s governor signed legislation phasing out subminimum wages on March 18, 2020. The law becomes effective on June 16, 2020, see, L.D. 1874 (129th Legis. 2020), <https://legislature.maine.gov/legis/bills/getPDF.asp?paper=HP1340&item=3&snun=129>.

<sup>1052</sup> Final Report, Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, p. 9 (Sept. 2016) [https://www.dol.gov/odep/topics/pdf/ACICIEID\\_Final\\_Report\\_9-8-16.pdf](https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf).

<sup>1053</sup> *Ibid.*, 10.

possible programs may occur on the spectrum from competitive integrated employment to subminimum wages. For example, competitive integrated employment as well as subminimum wage programs in sheltered workshops may include day services for employees that are supported by the employees' Medicaid benefits.<sup>1054</sup>

### *Vermont (Site Visit)*

In March 2020, the Commission conducted a site visit to Burlington, Vermont. The Commission chose Vermont as representative of states that have phased out payment of subminimum wages to people with disabilities. Vermont became the first state in the United States to eliminate the use of subminimum wages to pay people with disabilities when the last sheltered workshop in the state closed in 2002.<sup>1055</sup> Vermont achieved an end to subminimum wage and segregated employment by ending funding for new entrants into sheltered workshops in 2000, which also began a three year phase-out of all subminimum wage, sheltered employment.<sup>1056</sup> It therefore has the longest history of this policy.

In the nearly two decades since the closure of Vermont's last sheltered workshop, the employment rate for individuals with intellectual and developmental disabilities in the state rose from 35.8 percent in 2008<sup>1057</sup> to 42 percent in 2016-2017; this 2016-17 rate is also more than double the national average employment rate of 20 percent, for this group.<sup>1058</sup> The average biweekly wages for individuals with intellectual and developmental disabilities in Vermont in 2016-2017 was \$320.46 compared to a national average biweekly paycheck of \$233.83 for the same group.<sup>1059</sup>

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<sup>1054</sup> Ibid., 9.

<sup>1055</sup> Bryan Dague, Ed.D., Research Assistant Professor, University of Vermont-Center on Disability & Community Inclusion, Written Statement for the *Subminimum Wages Briefing* before the U.S. Comm'n on Civil Rights, Nov. 15, 2019, at 1 (hereinafter Dague Statement) (New Hampshire became the first state to eliminate subminimum wages through legislation in 2015, subminimum wage payments were prohibited beginning on July 6, 2015) N.H. Code Ann. § 279:22.

<sup>1056</sup> National Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, (Oct. 2018) p. 72.

<sup>1057</sup> Butterworth, J., Hall, A.C., Smith, F. A., Migliore, A., Winsor, J., Domin, D., & Sulewski, J. (2013). *StateData: The National Report on Employment Services and Outcomes 2012*. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion, p. 333.

<sup>1058</sup> UMass Boston, Institute for Community Inclusion, *StateData.info, State Employment Snapshot: Vermont*, <https://www.statedata.info/statepages/Vermont> (last accessed Feb. 2, 2020).

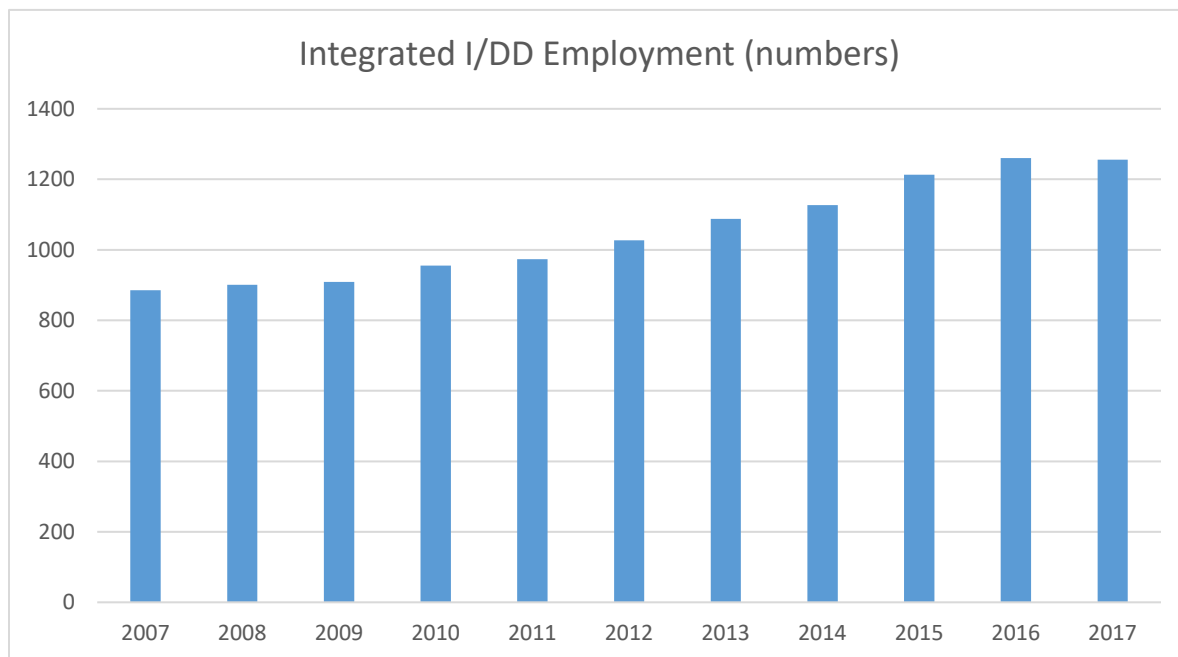
<sup>1059</sup> Ibid. Also, Vermont's minimum wage is about average: higher than other states but lower than others. See U.S. Dep't of Labor, *Consolidated Minimum Wage Table* (effective date 01/01/2020), <https://www.dol.gov/agencies/whd/mw-consolidated>.

The average number of hours these individuals worked over a two week period in Vermont was 21 hours, compared to 26.2 hours nationally.<sup>1060</sup>

The comparative data in the first section of this chapter shows that Vermont’s wages for persons with disabilities are lower than other states.<sup>1061</sup> This lower wage may be due to fewer hours being worked, although that data is not included for all six of the states studied here.

At the same time, within the dataset studied, Vermont has the highest and fastest-increasing employment rates of persons with disabilities than any of the other six states studied, especially for persons with cognitive disabilities. The numbers of persons in that category are illustrated in the chart below.

**Chart 4.10: Number of Individuals with Disabilities working in Integrated Employment, Vermont (2007-2017)**



Source: UMass Boston, Institute for Community Inclusion, Statedata.info, “State IDD Agencies: Vermont,” <https://www.statedata.info/data/showchart/614689>

In his testimony to the Commission, Dr. Bryan Dague of the Center on Disability and Community Inclusion of the University of Vermont explained how Vermont became the first state in the nation to close all of its sheltered workshops.<sup>1062</sup> Beginning in 1980, state officials and officials from the

<sup>1060</sup> UMass Boston, Institute for Community Inclusion, StateData.info, *State Employment Snapshot: Vermont*, <https://www.statedata.info/statepages/Vermont> (last accessed Feb. 2, 2020).

<sup>1061</sup> See *supra* Chart 4.2.

<sup>1062</sup> See *generally*, Dague Statement at 1-2.

University of Vermont began a demonstration project that led a group of 70 employees working in a sheltered workshop through a transition to competitive integrated employment.<sup>1063</sup> The initial transition took three to four years to successfully move all 70 employees into job placements in the community.<sup>1064</sup>

In a report published in 2012, Dague followed up with individuals and family members of individuals who had worked in a sheltered workshop in Vermont.<sup>1065</sup> Dague noted several strategies for a successful transition to integrated employment, which included:

(a) A clear statement of philosophy and values, (b) strong leadership, (c) ongoing education and training of staff, (d) a flattened organizational structure, (e) teamwork, (f) the use of person-centered planning, (g) stakeholder involvement, (f) openness to risk-taking and (h) continuous improvement.<sup>1066</sup>

Dague also identified the most significant challenge to conversion to integrated employment came from “negative attitudes” from stakeholders, such as concern from parents of people with disabilities that their children would be ostracized or stigmatized in community settings because of their disability, or that employment opportunities for their children at or above minimum wage would not exist.<sup>1067</sup> Other major challenges include funding structures, federal and state regulations, and lack of education and leadership.<sup>1068</sup>

In interviews with twelve individuals with intellectual disabilities who had experience receiving services before and after one service provider transitioned to providing integrated employment services, Dague’s study found that individuals and their families were overall satisfied with their community jobs, and have gained additional skills and interests based on interactions with their coworkers without disabilities.<sup>1069</sup> Parental fears that former employees of sheltered workshops would be ridiculed and unsafe in their community jobs were not realized, although some participants reported working less consistent hours than they did in the workshop.<sup>1070</sup>

A 2018 report by the National Council on Disability (NCD), the independent federal agency tasked with providing recommendations to the President, Congress, and federal agencies about issues

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<sup>1063</sup> Ibid., 1.

<sup>1064</sup> Ibid.

<sup>1065</sup> Dague, Bryan, “Sheltered employment, sheltered lives: Family perspectives of conversion to community-based employment” *Journal of Vocational Rehabilitation*, 37 (2012): 1-11.

<sup>1066</sup> Ibid., 2.

<sup>1067</sup> Ibid.

<sup>1068</sup> Ibid.

<sup>1069</sup> Ibid., 8.

<sup>1070</sup> Ibid., 10.

affecting people with disabilities, found that “Vermont’s economy is highly dependent on small businesses and ‘mom and pop’ operations,” thus it is important for integrated employment programs in the state to have partners in the business community.<sup>1071</sup> As part of its report, NCD conducted site visits to several states, including Vermont. NCD found that the state’s success in running integrated employment programs for people with disabilities can, in part, be attributed to a willingness to provide support for all types of employment, including self-employment.<sup>1072</sup> NCD visited Champlain Way2Work, which assists people with disabilities in finding community jobs. NCD found that Champlain Way2Work works with nearly 60 businesses to find employment for people with disabilities, and that Champlain Way2Work has an 85 percent success rate in finding job placements for people with disabilities.<sup>1073</sup>

The Commission received one public comment from Vermont, asking to “consider the real impacts on the civil rights of people with disabilities when it comes to subminimum wages,” and stating that: “People with disabilities want to and can work in mainstream jobs in their community and earn the same as their nondisabled peers, through competitive integrated employment.”<sup>1074</sup>

On March 4, 2020, a Subcommittee of the Commission conducted site visits to several employment and services providers in the Burlington area of Vermont.

### *Tour*

Three Subcommittee Commissioners and staff went on tours of three locations in Vermont on March 4, 2020: the Howard Center, Project Search, and Think College at University of Vermont, discussed below.

### **Howard Center**

During the March 4, 2020 tour, the Howard Center explained that it is the designated agency<sup>1075</sup> for state services for persons with developmental disabilities in the Burlington area, serving 16,000 people in 61 locations.<sup>1076</sup> Howard Center is also a “safety connection” that provides an overnight

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<sup>1071</sup> National Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, (Oct. 2018) p. 72.

<sup>1072</sup> *Ibid.*, 74.

<sup>1073</sup> *Ibid.*

<sup>1074</sup> Public comment No. 629 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>1075</sup> In Vermont, each county has one designated agency responsible for coordinating services for persons with developmental disabilities for the whole county. The designated agency can provide themselves or refer to other agencies. *See e.g.*, Developmental Disabilities Service Division, State of Vermont, <https://ddsd.vermont.gov/services-providers/providers> (accessed April 7, 2020).

<sup>1076</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

program so people can live independently and call someone if they need it.<sup>1077</sup> They also provide 206 shared living arrangements, as well as ongoing work with program managers to coordinate services. Howard Center also provides relevant community support for one-on-one sessions with a direct services professional to gain skills to meet the goals they have set with their program manager, but it is capped at 20 hours/week for each individual.<sup>1078</sup> They have a resource center where people can sign up for classes (some self-taught) in art, cooking, karaoke, drama, yoga, etc., as well as “many group meetings to discuss a focus, such as dialectical behavioral therapy to learn emotional regulation.”<sup>1079</sup> Some people whom the Howard Center serves overall are not seeking employment because they are older, medically fragile, unable to communicate an employment goal, young and adjusting to adult life, or for other reasons.<sup>1080</sup>

In addition to the skills-learning and therapy programs, Howard Center has more direct employment services. These include: serving 225 people with disabilities in employment services, with 17 people supporting them; a career group to develop career path/postsecondary education goals; and a communications group including how to use communication technology.<sup>1081</sup> Employment advisers work with individuals with disabilities and employees to train and onboard person with disabilities, then do periodic check-ins on the job, with a minimum of at least one bi-weekly. The Center also employs job coaches and living skills specialists for people who need one-on-one job supports on an ongoing basis. Director of Development Sima Breiterman emphasized that there is no one model, saying that “one model can’t be the model for all people in any services.”<sup>1082</sup>

Other tools used include outreach to businesses to hear their needs in advance of having a need to place someone. Businesses also provide testimonials on their experience or “employer-to-employer advocacy” in which employers of persons with intellectual and developmental disabilities talk about their experiences.<sup>1083</sup> Howard Center staff also said that employers are becoming more used to interacting with people with disabilities.<sup>1084</sup> Staff also discussed that the perspective of students being together is also impactful, stating that as this generation of students

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<sup>1077</sup> Ibid.

<sup>1078</sup> Ibid.

<sup>1079</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

<sup>1080</sup> Ibid.

<sup>1081</sup> Ibid.

<sup>1082</sup> Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

<sup>1083</sup> Ibid.

<sup>1084</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

are more used to being together with persons with disabilities and since they are future employers, a “generational change in approach” is occurring.<sup>1085</sup>

The Subcommittee was told that with this system, 80-82% of people receiving support are currently employed, while the remainder are working on skills to be successful, defining their own interests, or finding the right job.<sup>1086</sup> Of the 645 served by their agency who are employment-eligible, there is a 49 percent employment rate during the year.<sup>1087</sup>

### Think College

The National Coordinating Center is at University of Massachusetts’ Institute for Community Inclusion,<sup>1088</sup> and University of Vermont’s Center on Disability and Community Inclusion has a Think College Vermont program which is a university program for students with intellectual and developmental disabilities.<sup>1089</sup> In the introduction, Scott Thomas stated that they were the first state in the country to have to transition to competitive integrated employment, and that this was done through a strategic plan for inclusion and equity.<sup>1090</sup> Jesse Sutor explained that University of Vermont’s Center on Disability and Community Inclusion was one of 67 centers around the country that received federal development assistance to support community living and independence, and that he believes that this charge includes competitive integrated employment.<sup>1091</sup>

According to its website,:

Think College Vermont at UVM is an innovative, inclusive, academic, social, and vocational program for students with intellectual and developmental disabilities seeking a college experience and career path. Participants may earn a 12 credit-hour certificate of college studies for non-matriculated students designed to include: Academic Enrichment, Socialization & Recreation, Independent Living & Self-Advocacy Skills, Integrated Work Experiences & Career Skills. Think College Vermont at UVM incorporates student-centered planning, academic advising, and peer mentors for an inclusive, supportive college experience. Think College Vermont is a two-year non-degree certificate program

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<sup>1085</sup> Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

<sup>1086</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

<sup>1087</sup> Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

<sup>1088</sup> See ThinkCollege.net (accessed April 7, 2020).

<sup>1089</sup> See Think College Vermont at UVM, <https://thinkcollege.net/programs/think-college-vermont-at-uvm> (accessed April 7, 2020).

<sup>1090</sup> Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

<sup>1091</sup> Ibid; 42 U.S.C. § 15063.

through the UVM Continuing and Distance Education and the UVM Center on Disability and Community Inclusion.<sup>1092</sup>

The Subcommittee sought to better understand how educational and employment opportunities can be increased for persons with disabilities, especially considering that the State of Vermont does not have subminimum wage positions that may theoretically provide opportunities. Think College is funded by a Medicaid waiver, and the \$8,000/semester cost of tuition for each student is often funded by their individual Medicaid waiver or through “state gap funding;” however three out of the current 13 students are paying privately.<sup>1093</sup> The stated employment outcomes are significant – there is a 90% employment rate for students who complete the program.<sup>1094</sup> On one hand, these are excellent employment outcomes, but on the other hand, they only encompass persons with disabilities who have access to the university’s program.

In the program, individuals with disabilities work with undergraduate mentors who provide one-to-one support. Mentors are paid, and they go through an application process and interview.<sup>1095</sup> One of the peer mentors who was present did not have a disability.<sup>1096</sup> During the tour, Think College staff told the Subcommittee that each student gets 20 hours of support per week on campus, and that mentors attend class with students and help them with assignments, navigate social life, and they provide orientation and online training.<sup>1097</sup>

Staff also explained that mentors help the students academically and socially, and the program itself helps with self-esteem, employability skills, and making friends through classes and clubs.<sup>1098</sup> The students also do career exploration and at least one, semester-long internship during their time in the program. One student is currently interning at a café, another at the Peace and Justice Center.<sup>1099</sup>

### **Project Search – University of Vermont Medical Center**

The Subcommittee learned about Project Search, a pilot student internship program for persons with disabilities that partners with the University of Vermont’s Medical Center. Before working

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<sup>1092</sup> See Think College Vermont at UVM, <https://thinkcollege.net/programs/think-college-vermont-at-uvm> (accessed April 7, 2020).

<sup>1093</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

<sup>1094</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

<sup>1095</sup> Ibid.

<sup>1096</sup> Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

<sup>1097</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

<sup>1098</sup> Ibid.

<sup>1099</sup> Ibid.



with the hospital, Project Search partnered with Edge fitness center.<sup>1100</sup> At the University of Vermont Medical Center, the Subcommittee heard from four students with disabilities about their internship experiences:

- Participant 1 told the Subcommittee that he interns at the hospital bringing pumps for sterilization. He said he had to learn his way around the hospital, but he learned to do the job independently. He had a prior internship there as well, delivering gifts from the gift shop.
- Participant 2 stated that he interned distributing supplies for patients, such as bringing socks, soap, toothbrushes, etc. to the nursing stations. He also interned in employee wellness, talking about health issues, which he enjoys because he likes interacting with people.
- Participant 3 was interning in sterilization, setting up trays and instruments to be wrapped and ready for the sterilizer, then pulling clean carts out. She has also interned in radiology, taking patients in, cleaning beds, and restocking. After a few weeks with her coach she could do the job without individual check-ins.
- Participant 4 was interning in stocking and taking inventory, as well as helping in radiology. She had also interned on the post-surgery floor, stocking and cleaning.<sup>1101</sup>

In addition to internships, Project Search holds employment planning meetings with the students about their career goals and any obstacles they should address, such as transportation or needed supports. Families are involved in meetings as well.<sup>1102</sup>

Staff stated that students have been ages 18-24,<sup>1103</sup> and they like the program because they get job experience, something for their résumé, and to build a network of references.<sup>1104</sup> Students learn transferable skills like what it is like to work all day and to have the stamina for that, how to communicate with managers, show up on time, and call and email co-workers.<sup>1105</sup> However, challenges include access to transportation that create problems of arriving on time, and they are hoping to add nutritional services and patient transportation for additional internships.<sup>1106</sup>

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<sup>1100</sup> Ibid.

<sup>1101</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020); Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

<sup>1102</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

<sup>1103</sup> Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

<sup>1104</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

<sup>1105</sup> Ibid.

<sup>1106</sup> Notes of Maureen Rudolph, General Counsel (Mar. 4, 2020).

Over the history of the program, employment outcomes included the hospital hiring a student directly, another graduate who worked at PetSmart, and another who worked in stocking and inventory at a manufacturing firm. Last year, all eight graduates found employment.<sup>1107</sup>

### *Roundtable*

The Vermont roundtable took place on March 4, 2020 and consisted of a Subcommittee of the Commission with Commissioner Kladney, Commissioner Adegbile, and Commissioner Heriot present.<sup>1108</sup> The discussants who participated in the roundtable consisted of nine individuals from multiple organizations around Vermont. The below list are the individuals with their titles and organizations listed.

- Mickey Bonges, Essex High School Transition Specialist
- John Cammarano, General Manager, Homewood Suites Hotel, Community Employer
- Bryan Dague, Think College, Vermont
- Monica Hutt, Commissioner, Vermont Department of Disabilities, Aging and Independent Living
- Jennie Masterson, Developmental Disabilities Services Division, Vermont Supported Employment Services Coordinators
- Michelle Paya, Director of Education Services, Champlain Community Services
- Mike Reilly, Champlain Community Services
- Elizabeth Sightler, Agency Executive Director, Champlain Community Services
- James Smith, Policy Manager, Vermont Division of Vocational Rehabilitation<sup>1109</sup>

The roundtable discussion covered a variety of topics regarding employment opportunities in Vermont with individuals with disabilities. Some of the most prominent themes are discussed below.

The roundtable was held at Champlain Community Services which is considered a specialized services agency. In Vermont, there are eleven designated agencies and five specialized agencies.<sup>1110</sup> The state requires that Champlain Community Services have a 45 percent employment rate for individuals with disabilities who use their services. Michelle Paya, Director

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<sup>1107</sup> Notes of Amy Royce, Special Assistant to Commissioner Kladney (Mar. 4, 2020).

<sup>1108</sup> David Kladney, Commissioner and Chair of Subcommittee on Subminimum Wages, U.S. Commission on Civil Rights, testimony, *Subminimum Wages Vermont Roundtable Transcript*, p. 4.

<sup>1109</sup> Subminimum Wages Vermont Roundtable Transcript, p. 2.

<sup>1110</sup> Elizabeth Sightler, Agency Executive Director, Champlain Community Services, *Vermont Roundtable Transcript*, pg. 9.

of Education Services, stated that in 2018, about 81 percent were employed and the organization had an average of 79 percent employed at the close of 2019.<sup>1111</sup>

In terms of securing gainful employment, Executive Director Elizabeth Sightler explained that she believes that employment services should begin before a student graduates high school and continue post-graduation and help them with the transition process. For instance, one program offered by Champlain Community Services is the “School2Work” program which is offered to ensure that students are graduating high school and have secured employment.<sup>1112</sup> She told the discussants at the roundtable that:

From my perspective, having been in this field for 23 years now, I see a big transition [] between students who are graduating now and when I first started. Now they’re really expecting to have jobs. Now they anticipate that they will be working. There’s a whole different psychology about where they belong in the workplace.<sup>1113</sup>

Similarly, Mickey Bonges argued that transition services need to start before students graduate high school in order to find gainful employment. For instance, she explained that her programs have placed 65 students into community jobs in 2019 and they are all being paid the state minimum wage, which is \$10.96 in Vermont.<sup>1114</sup> Commissioner Monica Hutt for the Vermont Department of Disabilities, Aging and Independent Living, explained the importance of these transitional and support services as well. Hutt stated that:

Because imagine a kid graduating from high school. They’re either going to go completely independent and maybe have [a service provider like] Vocational Rehabilitation as a backup support for any other additional barriers to work or continuing career development. Or they’re going to come into developmental services and receive those more specialized supports.<sup>1115</sup>

Mickey Bonges, Essex High School Transition Specialist added that in the state of Vermont, school to work transition programs and support are available, but they are very individualized and not implemented through the Department of Education. Therefore, the services and programs that are available to individuals with disabilities are locally and district-driven.<sup>1116</sup> Bonges further explained that “[i]t’s pretty much per the school district. Everyone has – most people have a

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<sup>1111</sup> Michelle Paya, Director of Education Services, Champlain Community Services, *Vermont Roundtable Transcript*, pg. 9.

<sup>1112</sup> Sightler Testimony, *Vermont Roundtable Transcript*, p. 10.

<sup>1113</sup> Ibid.

<sup>1114</sup> Mickey Bonges, Essex High School Transition Specialist, *Vermont Roundtable Transcript*, pg. 12.

<sup>1115</sup> Monica Hutt, Commissioner, Vermont Department of Disabilities, Aging and Independent Living, *Vermont Roundtable Transcript*, p. 56.

<sup>1116</sup> Bonges Testimony, *Vermont Roundtable Transcript*, pp. 55-56.

transition program. They look different [] they're not all the same. It just depends on what the needs of the district are and the administration and what they believe in."<sup>1117</sup> James Smith, Policy Manager, Vermont Division of Vocational Rehabilitation, added that the success of these programs is due to strong buy in and support from the state legislature. Smith stated that:

[W]e have one sort of statewide mechanism around transition [from high school] ... we have core transition teams in each of the 12 districts in the state. And that the place where VR [Vocational Rehabilitation], the populated or school staff, the designated agencies comes together and plan and coordinate. And it's locally driven, and it seems to be quite effective in terms of making sure students aren't missed."<sup>1118</sup>

Smith added that while there is strong support from the state, the supports and services are predominately locally driven.<sup>1119</sup> The fact that these services and programs are predominately locally-driven raised concerns for some of the discussants at the roundtable, especially when it comes to the opportunities for those individuals living in rural areas, where there may be less opportunities.<sup>1120</sup> But the discussants mentioned that there has been a growth of small businesses in Vermont and more employers are supporting the idea of hiring individuals with disabilities.<sup>1121</sup>

Discussants at the roundtable also explained that there are various programs in Vermont to help individuals with disabilities find jobs, including Vocational Rehabilitation and Project Search. They explained that the latter helps both young and older adults, and described it as "a little bit more job-centric" and is an "industry-based one-year program for individuals to learn complex and technical skills and come out with a job."<sup>1122</sup> Specifically, Project Search's host sites are with three hospitals in Vermont, though they did not mention how many individuals with disabilities these hospitals employ.<sup>1123</sup> The discussants also used this program as an example about the need to change the perception in society that individuals with disabilities are not capable of doing various types of jobs, and rather employers just need to be more open to creating opportunities for them.<sup>1124</sup> For instance, Jennie Masterson, Developmental Disabilities Services Division, Vermont Supported Employment Services Coordinators, discussed that:

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<sup>1117</sup> Ibid., 56.

<sup>1118</sup> James Smith, Policy Manager, Vermont Division of Vocational Rehabilitation, *Vermont Roundtable Transcript*, p. 57.

<sup>1119</sup> Ibid., 58.

<sup>1120</sup> Jennie Masterson, Developmental Disabilities Services Division, Vermont Supported Employment Services Coordinators, *Vermont Roundtable Transcript*, pp. 26-27.

<sup>1121</sup> Ibid.; see also, Hutt Testimony, Vermont Roundtable Transcript, p. 35.

<sup>1122</sup> Masterson Testimony, *Vermont Roundtable Transcript*, pp. 17-18.

<sup>1123</sup> Ibid., 18.

<sup>1124</sup> Ibid., 18-19.

Some states label people as either being employable or not employable. And we don't do that here. We believe that anybody can work if we're able to give them customized and appropriate supports. And we are lucky. We are allowed to have a lot of really, really, very involved businesses and employers who are very good to work with.<sup>1125</sup>

One way to offer individuals with disabilities these supports can be through the use of assistive technologies, which have been shown to be an asset to the disability community.<sup>1126</sup> For instance, Director of Education Services Paya told the story of a woman with intellectual disabilities who works at a mall and is able to, through the use of an "iWatch," have her support staff communicate with her and help her with her tasks without having to physically stand with her, so she seems to be working completely independently.<sup>1127</sup>

Discussants at the roundtable further explained that too often individuals with disabilities are pushed into low skill jobs (e.g., janitorial work, stocking shelves at grocery stores) and not given the opportunity to pursue other careers.<sup>1128</sup> Paya explained that:

Within folks with disabilities, you have typical jobs that most folks with disabilities tend to gravitate towards. And we want out of that. We want out of that box of people only can work in grocery stores or can only work in janitorial means. We're going after these industries, and we want to train the next leaders. We want to take these talents and extract them from the folks that we clearly see have those skills and abilities to make a difference in the business community and get them into higher paying jobs, those more career-industries... I truly believe that Vermont as a whole, we don't find jobs. We find careers. Careers are sustainable. Jobs are just placement.<sup>1129</sup>

The discussants also mentioned that while individuals with disabilities should have a wider selection of jobs available to them, there may be additional complexities to hiring an individual with a disability and creating an integrated workforce. Champlain Community Services' Executive Director Sightler explained that:

We don't hold the philosophy that everybody can work anywhere. We're looking to find the right connections for people. And we also work with employers to make sure that they're employing somebody who's truly a contribution in their workforce. So, it's not a token position, that they're really employed. And that if they're not successful in that position, that they're terminate. That if they're not the right match, that we move. So, it

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<sup>1125</sup> Ibid., 19.

<sup>1126</sup> Paya Testimony, Vermont Roundtable Transcript, p. 23.

<sup>1127</sup> Ibid., 24-25.

<sup>1128</sup> See, Paya Testimony, *Vermont Roundtable Transcript*, pp. 15-16; Sightler Testimony, *Vermont Roundtable Transcript*, p. 39.

<sup>1129</sup> Paya Testimony, Vermont Roundtable Transcript, p. 15.

really is true employment, true gainful employment that also has this incredible secondary effect of allowing people to see the full spectrum of abilities. . . . We need to elevate the understanding of people with [intellectual/developmental disabilities].<sup>1130</sup>

One discussant at the roundtable was a local employer, John Cammarano, who is the General Manager of the Homewood Suites Hotel. He explained that the transition to an inclusive and integrated workplace was not initially easy or smooth, but has overall been successful.<sup>1131</sup> He explained that the integration “was a *process*,” relaying that:

At first, it was a little challenging. But the two particular employees that we do have just have a knack for really connecting with people. And they’ve kind of educated us. We’re not people with disabilities. We’re people with abilities just like you, just like me. The one student, every time I say, what’s your next career goal? He says, I want your keys because I want your job. I put them under the table, but he never takes them.<sup>1132</sup>

As of March 2020, the local Homewood Suites employed two students part-time who worked through the job employment program and who were on the “regular payroll.” And his hotel is looking to expand their employment program by working with Champlain Community Services to “secure some more folks in different locations.”<sup>1133</sup>

The transition to integrated workplaces and ending the use of the 14(c)-waiver program was also discussed in-depth, and the discussants offered many examples how eliminating the program can happen. Specifically, the discussants argued that this transition relies on service providers explaining the transition to business owners and getting them to support the process. Paya explained that:

So I’m looking at it on the business standpoint as 14(c) is allowing businesses to pay a subminimum wage to get a job done. And so, you’re asking businesses now to pay the minimum state wage or a wage competitive to those doing the position. And that, to me, is education to the business community is helping them understand that you have a process. And what your main mission is, is to get to the end product, to have this product made. . . . The employer wants bottom line and efficiencies. They need to get product or services out the door. So, our job is, how do we find ways to help that person meet those expectations and those efficiencies?”<sup>1134</sup>

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<sup>1130</sup> Sightler Testimony, *Vermont Roundtable Transcript*, p. 40.

<sup>1131</sup> John Cammarano, General Manager, Homewood Suites Hotel, *Vermont Roundtable Transcript*, p. 32.

<sup>1132</sup> *Ibid.* (emphasis added).

<sup>1133</sup> *Ibid.*

<sup>1134</sup> Paya Testimony, *Vermont Roundtable Transcript*, pp. 69-70.

Similarly, James Smith, Policy Manager, Vermont Division of Vocational Rehabilitation, argued that:

[14(c) has] an inherent conflict of interest. If you operate a sheltered workshop where you have a business customer who is coming to you saying, I want this product done and then you have the consumers you're serving. So, for us, there's no conflict of interest. We're trying to support the consumer to get a job, and we're trying to support the employer, make a good match. But we don't have any financial interest in the outcome. But if you're running a sheltered workshop, you have financial interest in paying as little as possible to your workers and getting the best product out there. So, you have no incentive to take, oh, Joe [whose] been working [in] the sheltered workshop for years. He doesn't have a job. Maybe he could get a job in the community. There's no incentive for you to do that. And so, until we take that fundamental – the option off the table, that will never go away.<sup>1135</sup>

Commissioner Hutt stated that she sees transitioning from the waiver program as “very akin to the idea of deinstitutionalization. And as long as you maintain empty beds, those beds will be filled. So as long as you maintain a subminimum wage, there is no incentive to make any change.”<sup>1136</sup>

Similarly, Jennie Masterson, Developmental Disabilities Services Division, Vermont Supported Employment Services Coordinators, said that to end the waiver program the first thing that sheltered workshops needed to do was “close the front door. So, you stop bringing people in, especially stop around young people coming out of high school and young adults come into the workshop. And what that requires is an alternative service provision for those individuals. So, some form of excellent employment services you develop for the young people coming in.”<sup>1137</sup>

However, the discussants also recognize that many family members are fearful of the waiver program ending (which was a prominent theme among the public comment submissions received by the Commission).<sup>1138</sup> Smith explained that he understood the concern expressed by family members and stated that “if I was a parent and my son or daughter had been in my workshop for 20 years, I would be extremely anxious. So, you have to plan for that. It has to be well thought out process.”<sup>1139</sup>

Sightler also acknowledges that much of family member's fear centers on being concerned about the well-being of their family member with disabilities. She explained that:

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<sup>1135</sup> Smith Testimony, *Vermont Roundtable Transcript*, pp. 73-74.

<sup>1136</sup> Hutt Testimony, *Vermont Roundtable Transcript*, p. 64.

<sup>1137</sup> Masterson Testimony, *Vermont Roundtable Transcript*, p. 68.

<sup>1138</sup> See *supra* notes 563-566.

<sup>1139</sup> Smith Testimony, *Vermont Roundtable Transcript*, p. 74.

Here at Champlain Community Services, we still have a memory of what that transition [from a sheltered workshop to integrated employment] was like... We have family members who were extremely reluctant. I would say maybe even terrified of what the world – how the world would be welcoming of their person. Whether employers would be able to support them. Whether there was a community who cared about understanding somebody’s skills and abilities while also understanding their behaviors and disabilities.<sup>1140</sup>

However, Sightler also stated that after the state ended the use of the 14(c)-waiver program and transitioned to integrated employment attitudes changed. She opined that in her experience:

I’ll say is there were families who were, I would say, the most upset, the most frustrated, angry, scared families are the ones who ultimately became the strongest advocates for – in support of community-based supported employments. Families who originally said, my adult child won’t be safe in the community, were able to see the transition of their adult child and see that they became more independent, that they became more communicative, that their wellness was improved, that the community was embracing them because they’d been given an opportunity. And it was a leap of faith.<sup>1141</sup>

Another central concern about ending the use of waiver programs centered on the scarcity of jobs due to the perception that employers would not be able to pay workers a minimum wage and this lack of opportunities would force individuals with disabilities to remain at home during the day and leave them without options. Jennie Masterson acknowledged that initially employers were negatively impacted by the transition, stating that: “In Vermont, it was painful for an employer certainly that were involved in our shelter workshops because the subcontract work just became less and less and less to the point where [] our sheltered workshops became obsolete. And... they never made a profit.”<sup>1142</sup>

Similarly, Director Paya explained that the first step was that business owners needed to change their mentality about hiring individuals with disabilities and it was up to service providers to show them how an integrated workforce is possible. She argued that:

[Transition is] scary because businesses are looking for bottom lines. They need to make sure they’re making – they’re in the black and they’re making a profit. But our jobs are to educate them and how important it is to have neurodiversity within an organization and that everybody can do the job. Everybody can learn. It’s the teaching that has to be

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<sup>1140</sup> Sightler Testimony, *Vermont Roundtable Transcript*, p. 64.

<sup>1141</sup> *Ibid.*, 75-76

<sup>1142</sup> Masterson Testimony, *Vermont Roundtable Transcript*, p. 68.



different. And our job is to figure out what that teaching tool is to help businesses see the efficiencies in the folks we support.<sup>1143</sup>

Regarding family members' fears, Hutt conceded that upon the closing of all the sheltered workshops, not all those employees with disabilities were able to secure a job in the community.<sup>1144</sup> Therefore, Hutt stated that she recognized the concern raised by family members, adding that:

So, I think that the fear... is about families. But what's going to happen on a day-to-day basis? I'm not home. I can't have Jane at home. And if she's not at the sheltered workshop, what is she doing? So that's where the community-based supports ... come into play. We started to build consciously really active community systems for individuals, community connections. So sometimes those [] they started as a little bit more congregate. They moved to become more individual by person so that we were bringing people into the community. Their days were still filled. Their time was filled. And that's what I talked about when I said there is this shift in investment. You're no longer funding this, but you're funding this. And this might cost a little more money for a period of time until you have to make that investment. But people's hours were still filled. There were not just left abandoned because there wasn't some minimum wage to keep them busy at an employment somewhere. So those community-based supports were not only about building community but about building people's skills so that they became job ready to enter competitive employment in a different way.<sup>1145</sup>

Lastly, Hutt argued that family members and the broader community need to be supporting the end of 14(c) programs for the following fiscal reasons:

[I]t is a forever federal subsidy... [] [and] somebody on subminimum wage is never going to come off benefits. They are never, ever going to not be in need of [] a full package of federal benefits, whether that's rental subsidy to food stamps. I mean, you can't get off of those benefits at subminimum wage. And I think that's why I get to pushing about that subminimum wage because I just feel like it's a disincentive to independence. It's a disincentive to inclusion. It's a disincentive to your own value as a human being basically.<sup>1146</sup>

The Commission received many public comments from family members stating that the 14(c) program needs to be maintained because it gave their family members who had disabilities a sense

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<sup>1143</sup> Paya Testimony, Vermont Roundtable Transcript, p. 72.

<sup>1144</sup> See, Hutt Testimony Vermont Roundtable Transcript, p. 77.

<sup>1145</sup> Hutt Testimony, Vermont Roundtable Transcript, pp. 77-78.

<sup>1146</sup> *Ibid.*, 82-84.

of pride and made them feel like everyone else in the family who brought home a paycheck.<sup>1147</sup> However, during the roundtable, Bonges argued that ending the 14(c) program is a better way to encourage this sense of pride and satisfaction, stating that:

I'm working with kids that are 14, 15, 16-year-olds for the first time that they've ever worked. And some of these kids come from poverty. And we work with quite few kids that come from poverty. And they get that because our philosophy for our school district is we pay minimum wage. If minimum wage goes up, we pay minimum wage. That's what we do. This is what it feels like to work an hour. This is 10.96. This is what you get when you work an hour. It's so important. And it changes their lives. This is what it feels like. They buy into it. I mean, money has power. And you're getting the same as your brother gets at his job at Dominoes or whatever. This is it. And getting school credit for it, and it's so important. And they're not less than anybody else.<sup>1148</sup>

Commissioner Adegbile observed that the site visits in Vermont and Virginia on two consecutive days presented very different attitudes regarding the 14(c) program. Commissioner Adegbile described individuals addressing the Commission in Virginia as fearing “we’re off a cliff without the status quo.”<sup>1149</sup> In contrast, in Vermont individuals addressing the Commission expressed that Vermont underwent a “professional”<sup>1150</sup> transition process to provide “a soft landing”<sup>1151</sup> for people with disabilities who had been working in 14(c) programs.

Throughout the roundtable, the discussants seemed to all agree that the Vermont model is not an anomaly and the models utilizing in the state can be replicated nationally.<sup>1152</sup> For instance, Hutt stated that one of the strategies that Vocational Rehabilitation has been able to do is as new industries open up in the state, they have worked to try and identify what those industries may need and then conduct mass training to meet those needs.<sup>1153</sup> She opined that:

So again, rather than looking at it from a supported employer-employee approach, looking what the business needs are, identifying what those training needs are going to be, and getting the workforce in that area, both disabled and nondisabled, ready to meet that industry need in a really targeted way. I think that has been a really successful approach in

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<sup>1147</sup> See e.g., Public Comment Nos. 219, 475, 479, 635, 1,172, for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>1148</sup> Bonges Testimony, Vermont Roundtable Transcript, p. 85.

<sup>1149</sup> Commissioner Debo Adegbile, *Vermont Roundtable Transcript*, p. 64.

<sup>1150</sup> Masterson Testimony, *Vermont Roundtable Transcript*, p. 83.

<sup>1151</sup> Masterson Testimony, Vermont Roundtable Transcript, p. 82.

<sup>1152</sup> Hutt Testimony, Vermont Roundtable Transcript, p. 37.

<sup>1153</sup> *Ibid.*

that state of Vermont that I do think is replicable – it’s a really hard word to say, replicable – nationally.<sup>1154</sup>

Similarly, Sightler argued that Vermont is a good example of how a state can operate without using the 14(c) program. She stated that at Champlain Community Services:

[The focus is on] supporting people and their civil rights and their success in the community. And at the same time, building a community... this is part of our mission statement. But building a community where people participate and belong... I would say that Vermont... provides great evidence that there isn’t [a need for 14(c)]. That it is no longer a need to have subminimum wage... I’m here to say there’s great success beyond it and that people are served very well... So, it’s a true reality for the states who are looking to stop this [ending 14(c)] or to transition away from using 14(c). But there is a world beyond that [] I think we can – and many other states can too. I mean, it’s not just Vermont.<sup>1155</sup>

#### *Interviews:*

Commission staff interviewed a total of 15 persons who were employed via Champlain Community Services, and all were persons with disabilities including attention deficit disorder, autism, Down’s syndrome, and other cognitive and learning disabilities.<sup>1156</sup> No interviewees were currently employed at subminimum wages, as subminimum wages for people with disabilities are prohibited in Vermont, but some interviewees had worked for subminimum wages in the past. The interviewees expressed that their experiences with the 14(c) program were generally negative, such as a person who was paid less than his colleagues and another who is now retired after working for subminimum wages doing the same type of work that is now paid minimum wage. Interviewees working in competitive employment covered a wide range of abilities, career and life interests and job options. Interviewees expressed that they are able to fulfill their job requirements and find success in their chosen employment. Many identified areas for improvement in the employment services they are receiving, such as that they did not recall skills training except for what they learned on-the-job, and several expressed that they would like to work in other fields.

Interviews of individuals who identified that they had been paid subminimum wages in the past included:

- Jay Lafayette is a 50-year-old man who has worked since he was in high school on a paper route and making snow in a ski resort; he also competed in soccer and alpine skiing, and

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<sup>1154</sup> Ibid., 38.

<sup>1155</sup> Sightler Testimony, *Vermont Roundtable Transcript*, p. 64.

<sup>1156</sup> OCRE Interview Notes (Mar. 4, 2020) (on file).

he has served on the Governor's Board of Disabilities and Special Olympics.<sup>1157</sup> After high school, Mr. Lafayette worked in restaurants and at a ball field, in landscaping for 9 years, and he is currently working in manufacturing at Fabtech, where he is seeking a welding license.<sup>1158</sup> He told Commission staff that he was paid minimum wage in most of his prior jobs, except while working at the Lakeview House Restaurant in Burlington, Vermont. He said that there, despite having a sous chef license and working as a chef, along with other tasks such as washing dishes, he was paid less than minimum wage and was made to work longer hours and more holidays than other staff. He explained, in his view, that he would "do more and get less than everyone else."<sup>1159</sup> When asked if this was because of his disability, he said yes, and that he thought "they were using that against me."<sup>1160</sup>

In contrast, at Fabtech, Mr. Lafayette is currently paid \$14.50/hour for welding, painting, and packaging pipes, and he is getting certified for his welder's license through work.<sup>1161</sup> Moreover, he stated that he is going to be "moving up to be more on the manufacturing line" once he gets his license for welding and painting, and that he gets along with the people he works with.<sup>1162</sup> He dislikes when it is slow and he only works 25 hours/week, as he would rather work full time.<sup>1163</sup> He found out about the opportunity through Champlain Community Services and he considers it a good opportunity because he is making more than minimum wage, which is "not a lot after taxes," and that he can "move up the ladder."<sup>1164</sup> He also said that he benefited from job coaches from Champlain Community Services and "Way to Work" came to his job site when he was learning new skills.<sup>1165</sup> In addition, he believes that persons with disabilities should get more than minimum wage and that they should get equal pay, and that they should not lose their benefits, commenting that it is "important that people can earn more money without losing their benefits."<sup>1166</sup> He based these comments not on Vermont but on other states and thinking about policy in

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<sup>1157</sup> OCRE Interview Notes, Jay Lafayette (Mar. 4, 2020) (on file) (Mr. Lafayette consented to using his full name in the report).

<sup>1158</sup> Ibid.

<sup>1159</sup> Ibid.

<sup>1160</sup> Ibid.

<sup>1161</sup> Ibid.

<sup>1162</sup> Ibid.

<sup>1163</sup> Ibid.

<sup>1164</sup> Ibid.

<sup>1165</sup> Ibid.

<sup>1166</sup> Ibid.

general, as he was part of advocating for the Americans with Disabilities Act of 1990, and is on the board of Champlain Voices, a self-advocacy organization.<sup>1167</sup>

- Commission staff also interviewed M.M., a 66-year-old man who had recently retired, who had worked through Champlain Community Services for 15 years, and he arrived early and was animated and seemed enthusiastic about the interview.<sup>1168</sup> Since high school, he has worked in dishwashing jobs, or “downstairs” at the previous Champlain Community Services sheltered workshop, as well as for 15 years in a music store in a local mall.<sup>1169</sup> At the music store, he said he bagged DVDs and videos, and put labels on the bags with sales stickers, being sure to match the items with the information on the stickers.<sup>1170</sup> Prior to that, at the sheltered workshop he said he did a lot of jobs for different companies, doing piecemeal work and working only with other persons with disabilities, except for supervisors.<sup>1171</sup> When asked what he liked and disliked about his work at the music store, he said, “I liked the people, the supervisors. I used to get paid a lot.”<sup>1172</sup> He described liking his work making the labels and bagging, and the company T-shirts he wore at work, and said that his only dislike was that sometimes the music was too loud; however, he felt like he could talk to his supervisors at the music store about any problems and commented that “[s]ometimes I did.”<sup>1173</sup> M.M. does not remember how much he was paid or if he ever received a raise. He found out about the job opportunity at the music store from someone from Champlain Community Services, although he said he never received any career counseling.<sup>1174</sup> When asked if he was provided with opportunities to learn new skills, he said that when he worked downstairs for different companies (at the sheltered workshop), the “directors and bosses helped us out on a lot of job trips,” and he “learned by doing.”<sup>1175</sup> Prompted by the Champlain Community Services director (who was in the room with him for support), he said that he learned on the calendar jobs. The director added that he learned to put together calendars, and Mr. M agreed.<sup>1176</sup>

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<sup>1167</sup> Ibid.; *see also* Champlain Voices, Who We Are, Our Board, <http://ccs-vt.org/our-board/> (accessed Mar. 24, 2020).

<sup>1168</sup> OCRE Interview Notes, M.M. (Mar. 4, 2020) (on file).

<sup>1169</sup> Ibid.

<sup>1170</sup> Ibid.

<sup>1171</sup> Ibid.

<sup>1172</sup> Ibid.

<sup>1173</sup> Ibid.

<sup>1174</sup> Ibid.

<sup>1175</sup> Ibid.

<sup>1176</sup> Ibid.

- Staff also interviewed 54-year-old Natalie Sinkew, who said she has been working at Goodwill for the last five years, and would like to work more hours.<sup>1177</sup> She also stated that her prior jobs only lasted a few months, after which she was laid off because they “didn’t accept me for what I could put in.”<sup>1178</sup> Regarding Goodwill, she described in detail her work reviewing clothes and pulling the color from a checklist, and putting labels on books. She said she would like something to sit down on when folding clothes or stuffing envelopes, as she really wants a job where she can sit but all the jobs she is told about require standing and she’s “tired of it.”<sup>1179</sup> Ms. Sinkew also noted that her commute is long and she has to get up early to take public transportation, and that she would prefer a closer Goodwill location.<sup>1180</sup> She currently makes \$10.96/hour and is hoping to go up to \$15/hour.<sup>1181</sup> She heard about the job through Ms. Paya at Champlain Community Services. When asked if she received career counseling or opportunities to learn new skills, she repeated that she would like a job where she can sit down, and she would like more hours.<sup>1182</sup>

Interviewees also included:

- C.B., age 52, is non-verbal and communicated through Champlain Community Services staff by patting the staff’s hand in response to questions.<sup>1183</sup> Mr. B. indicated in agreement with Champlain Community Services staff that he had formerly worked at a sheltered workshop, but preferred his current work at Harley Davidson.<sup>1184</sup> He has worked at Harley Davidson for the past five years, and at Shaw’s grocery store for the last 14 years.<sup>1185</sup> Currently, he works only one day a week at Harley Davidson, and three days a week for 3-hour shifts at Shaw’s. At Shaw’s, he cleans tables, collects cookies, straightens the aisles and greets customers, and he used to work collecting the shopping carts.<sup>1186</sup> At Harley Davidson, he cleans the bikes, and said that he likes everything about his job there and did not like working with the grocery carts at Shaw’s; however after he communicated with

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<sup>1177</sup> Ibid.

<sup>1178</sup> OCRE Interview Notes, Natalie Sinkew (Mar. 4, 2020) (on file) (Ms. Sinkew consented to using her full name in the report).

<sup>1179</sup> Ibid.

<sup>1180</sup> Ibid.

<sup>1181</sup> Ibid.

<sup>1182</sup> Ibid.

<sup>1183</sup> OCRE Interview Notes, C.B. (Mar. 4, 2020) (on file).

<sup>1184</sup> Ibid.

<sup>1185</sup> Ibid.

<sup>1186</sup> Ibid.

his supervisor at Shaw's he no longer has to work on the carts.<sup>1187</sup> He found out about both opportunities through Champlain Community Services, and the job training he receives includes learning how to fold shirts at Harley Davidson.<sup>1188</sup>

- G.H. age 51, who works at Asten Johnson (a paper manufacturing company), a job procured through Champlain Community Services, also spoke to Commission staff; he could not remember how long he has worked there but told Commission staff that it was “a long time,” and that it was his first job.<sup>1189</sup> He also was not sure how much he makes at Asten Johnson, where he puts things in boxes and also loads cars.<sup>1190</sup> He told Commission staff that he loves his job and likes his co-workers, but that he likes his boss “only a little bit,” because that person “always bosses me around.”<sup>1191</sup>
- Beverly Williams is a 30-year-old woman who has worked at her current job at AJH Fulfillment for almost three years; her previous jobs include working in a video store while she was in high school.<sup>1192</sup> She described in great detail her work receiving and processing from eBay and Amazon, including producing information for forms about the reasons for returns, date, order number and exchange information, based on customer comments.<sup>1193</sup> She has learned to enter information about negative comments, and enjoys helping people get what they need. When asked what she likes and dislikes about her job, she commented that:

I like the people very, very much. I like what I do [with] returns. I do love being on the computer, so that's why I like returns. [I also like] packaging things, trash and recycling – [I] enjoy the fresh air and like sweeping, I'm a neat freak... I really love my job.<sup>1194</sup>

When asked if she felt she could talk to her supervisors, she replied that “I feel like I can if I'm stressed out; the people are good listeners.”<sup>1195</sup> She is not sure how much she makes, but was sure that it was minimum wage. She found out about the opportunity through doing job searches on a computer at Champlain Community Services with a support person, and coming across AJH; she added that she didn't receive counseling and instead they agree

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<sup>1187</sup> Ibid.

<sup>1188</sup> Ibid.

<sup>1189</sup> OCRE Interview Notes, G.H. (Mar. 4, 2020) (on file).

<sup>1190</sup> Ibid.

<sup>1191</sup> Ibid.

<sup>1192</sup> OCRE Interview Notes, Beverly Williams (Mar. 4, 2020) (on file) (Ms. Williams consented to using her full name in the report).

<sup>1193</sup> Ibid.

<sup>1194</sup> Ibid.

<sup>1195</sup> Ibid.

with what she wants to do, and this job interested her the most.<sup>1196</sup> After that, Champlain Community Services made the trip with her to introduce them, and to try out returns with a support person present, after which AJH decided they wanted to hire her and welcomed her to the team.<sup>1197</sup> Ms. Williams also stated that she had the opportunity to build skills on the job, where her boss is supportive of her learning new things, and she was glad to learn the computer data entry skills as she “never had a computer job until now.”<sup>1198</sup> She added that Champlain Community Services is also teaching her cooking skills, as she currently lives with three people (in assisted housing) but would rather live on her own but needs to learn cooking skills first.<sup>1199</sup>

- David Baizley is a 27-year-old man who has worked at Moe’s, washing dishes for 20-30 hours/week, for over a year; previously he worked in the kitchen of a school.<sup>1200</sup> He told Commission staff that he likes the people he works with, but he doesn’t like “when it gets intense” with lots of dishes, especially on Black Friday.<sup>1201</sup> He said that he feels that he can talk to his supervisors, as he knows that he can email co-workers if he needs something.<sup>1202</sup> Mr. Baizley said he heard about the opportunity from one of the managers at his last job, who knew he was looking for something closer to home. Also, he said he has not received career counseling because he doesn’t need job support.<sup>1203</sup> He has learned dish washing skills and he is glad to have shifted to dishes because he prefers that to the food preparation work he was doing before.<sup>1204</sup> Finally, he also noted that prior to studying Liberal Arts, he attended a post-secondary school in a Midwestern state for individuals with disabilities, where he studied culinary arts. He said that while he likes working at his current job, he would like to eventually get a job using more of his skills that he learned at school.<sup>1205</sup>
- Staff also interviewed 25-year-old Sara Bourbon, who has worked at Rider’s Treats for 4-5 years, loading soda and snack vending machines and being responsible for counting the money and the number of sodas sold and making sure the numbers match, and for making

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<sup>1196</sup> Ibid.

<sup>1197</sup> Ibid.

<sup>1198</sup> Ibid.

<sup>1199</sup> Ibid.

<sup>1200</sup> OCRE Interview Notes, David Baizley (Mar. 4, 2020) (on file) (Mr. Baizley consented to using his full name in the report).

<sup>1201</sup> Ibid.

<sup>1202</sup> Ibid.

<sup>1203</sup> Ibid.

<sup>1204</sup> Ibid.

<sup>1205</sup> Ibid.



sure the products are not stuck and fixing them if they are.<sup>1206</sup> Prior to this job, she worked at Goodwill and Marshalls, mainly organizing clothing on the racks.<sup>1207</sup> She found her jobs through Champlain Community Services and says that she likes her current job, except when people distract her. She also does not know how much she is paid, although she does recall receiving a cost-of-living raise; she does not know if she has been provided opportunities to learn new skills.<sup>1208</sup>

- R.S. is a 49-year-old man who has worked at Endine & Williston, washing test tube bottles and recycling trash, since 1991, and since 2013, he has also worked at a place of employment he identified as PCC, assisting with mail, recycling, watering plants, and with his support person, stocking soda coolers together.<sup>1209</sup> Mr. S. stated that, “I like both my jobs and everything about them.”<sup>1210</sup> He found out about the opportunity at Endine from Champlain Community Services, who asked if he wanted a job in the community when he was in high school. He said that his job coach went in with him the first week, but has now become completely independent, and his job coach (who was in the room for support) agreed that he just drops him off and the only thing they have had to do together is at PCC with the soda machines, and with watering the plants because he is nervous about possibly spilling on the equipment.<sup>1211</sup> He added that he learned new skills at both Endine and at PCC.<sup>1212</sup>
- N.V. is a 32-year-old woman, who has been working at Pillsbury Manor, a senior home where she works in the kitchen and serving, for about 8-9 years, and at Marshalls, where she works stocking clothing and electronics, for about three months.<sup>1213</sup> She says that she started working when she was in school, but that Pillsbury Manor is her first paid job, and that she likes working with seniors and learning kitchen skills there, and at Marshalls, she likes that it is new and that she is learning to work with retail co-workers, although “sometimes they have a hard time helping her understand,” but she likes the boss.<sup>1214</sup> When asked how much she makes, Ms. V. showed Commission staff her pay stubs from Pillsbury, and said that she makes about \$10-\$11/hour. She said she found out about both jobs

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<sup>1206</sup> OCRE Interview Notes, Sara Bourbon (Mar. 4, 2020) (on file) (Ms. Bourbon consented to using her full name in the report).

<sup>1207</sup> Ibid.

<sup>1208</sup> Ibid.

<sup>1209</sup> OCRE Interview Notes, R.S. (Mar. 4, 2020) (on file).

<sup>1210</sup> Ibid.

<sup>1211</sup> Ibid.

<sup>1212</sup> Ibid.

<sup>1213</sup> OCRE Interview Notes, N.V. (Mar. 4, 2020) (on file).

<sup>1214</sup> Ibid.

through Champlain Community Services. When asked if anyone has provided her with opportunities to learn new skills, she said “not really.”<sup>1215</sup> She has had a variety of jobs in her life, and enjoyed her jobs related to self-advocacy for inclusive arts, but that she felt very frustrated that many places will not hire people with disabilities; moreover, her career advisor does not really help with the interview skills needed to find jobs.<sup>1216</sup> Moreover, she stated that staff do not understand her personal struggle, that more peer-to-peer support is needed, that transportation is a problem, and that “lots of people don’t have family to rely on,” which creates housing issues.<sup>1217</sup>

- Commission staff also interviewed a 28-year-old man who asked not to be identified in this report.<sup>1218</sup> He is currently working as an inventory assistant “assisting managers with inventory, checking that we have all the parts we need and the right numbers.”<sup>1219</sup> He has been working there for about a month and a half, after not having a job for a few years, and previously had “an unpleasant experience” when he was working as a teenager in another state.<sup>1220</sup> He said that the “work atmosphere is much more pleasant than I honestly expected,” especially after his last job experience, and that he was happily surprised when staff threw him a birthday party.<sup>1221</sup> He could not think of anything he disliked about his job.<sup>1222</sup> He is being paid minimum wage, which was recently increased to \$10.96/hour in Vermont.<sup>1223</sup> He said that he has been working with Champlain Community Services for a while to find the right job opportunity; but he also recalled a job he had during college when he was studying for his Liberal Arts degree, in which he maintained computer centers on campus and acted as the help desk when students needed assistance, and he was paid \$10/hour (while minimum wage in that state was \$9.25/hour).<sup>1224</sup> Asked if he had received job training, he said that he is “implicitly... learning to maintain a professional attitude” through his work with Champlain Community Services, but that he had learned other skills on the job.<sup>1225</sup>

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<sup>1215</sup> Ibid.

<sup>1216</sup> Ibid.

<sup>1217</sup> Ibid.

<sup>1218</sup> OCRE Interview Notes, Anonymous #1 (Mar. 4, 2020) (on file).

<sup>1219</sup> Ibid.

<sup>1220</sup> Ibid.

<sup>1221</sup> Ibid.

<sup>1222</sup> Ibid.

<sup>1223</sup> Ibid.

<sup>1224</sup> Ibid.

<sup>1225</sup> Ibid.

- Another person interviewed told Commission staff that he is a 22-year-old white man who also preferred to remain anonymous.<sup>1226</sup> He was working with Champlain Community Services to try to find a job and was jobless at the moment. His last job, procured from Champlain Community Services, was from March 2019 to January 2020, at a grocery store, which he left due to “multiple reasons,” including not getting along with a supervisor who replaced his prior boss after the company underwent a reorganization.<sup>1227</sup> He worked as a packer, weighed, priced and tagged food, then was promoted to salad preparation, and he said that he enjoyed his job and they were flexible with him if he needed to call in sick or go home; however, he said that “when the guy who hired me left, I felt cornered.”<sup>1228</sup> He said he found his new boss was controlling and he felt that she singled him out, and he got laid off. He was making \$11.50/hour and had received a raise when he was promoted to salad preparation. He had found out about the opportunity through Champlain Community Services doing outreach to the college program he was in for persons with autism, and he has received some career counseling through Champlain Community Services job coaches and through his case manager.<sup>1229</sup> When asked if he was provided opportunities to learn new skills, he replied, “I don’t think so. What I did was really straightforward, repetitive [and] step-based,” and that he only needed “occasional reminders” but that he grasped the work very quickly.<sup>1230</sup> He said he is now looking for a job that “doesn’t involve being in the back kitchen and [in which] I can interact with people.”<sup>1231</sup>
- Another man whom Commission staff interviewed was 25-year-old Thomas Caswell.<sup>1232</sup> At the time of the interview, Mr. Caswell had two jobs, one paid and one internship. He had been working at Green Mountain Self-Advocates for two years, and although he started as an unpaid volunteer through his fellowship regarding LGBTQ persons and disability, he was being paid \$13/hour and was expecting a raise to \$15/hour.<sup>1233</sup> He also volunteers as an education advocate in the Peace and Justice Center at a disability rights organization, where he is focusing on career goals, and he has worked in prior jobs, such as at Old Navy, and internships, particularly at advocacy organizations.<sup>1234</sup> His job duties are varied and include providing presentations, workshops on language and culture, Facebook and other

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<sup>1226</sup> OCRE Interview Notes, Anonymous #2 (Mar. 4, 2020) (on file).

<sup>1227</sup> Ibid.

<sup>1228</sup> Ibid.

<sup>1229</sup> Ibid.

<sup>1230</sup> Ibid.

<sup>1231</sup> Ibid.

<sup>1232</sup> OCRE Interview Notes, Thomas Caswell (Mar. 4, 2020) (on file) (Mr. Caswell consented to using his full name in the report).

<sup>1233</sup> Ibid.

<sup>1234</sup> Ibid.

social media, participating in advocacy during Disability Awareness Day at the state capitol, participating in conferences and various social outreach events, and traveling to check on local groups, although transportation can be very difficult because he cannot drive.<sup>1235</sup> He said that he likes his job because it is different than other organizations in that it is “very team-oriented,” and focuses on “empowering people to speak up for themselves.”<sup>1236</sup> He said that he feels that he can speak to his supervisors about any problems – for example, they are now looking at creative options to solve transportation problems, and hopes to get rides with other people or to take the train.<sup>1237</sup> Mr. Caswell found his job through being part of an advocacy group when he was in high school. He said that he was “absolutely” given opportunities to learn new skills, such as public speaking skills and LGBTQ outreach with other programs around the country.<sup>1238</sup> He also told Commission staff that he was very much against Section 14(c), stating that in 2020 people are still being discriminated against in sheltered workplaces where they are isolated; and that “we need to close Down’s Syndrome sheltered workshops,” and more generally, make work inclusive so that people are familiar with disability in workplaces, adding that: “We as a society need to be better than this.”<sup>1239</sup>

Staff also interviewed other persons with disabilities who reported they were highly successful in their public-facing jobs.

- Hasan Ko is a 25-year-old Burmese American man who has worked in a hotel for almost three years, as a “houseman,” providing answers to guests’ questions about services, and he also checks in guests, cleans tables, assists in the kitchen, and in housekeeping and laundry.<sup>1240</sup> He previously had a part-time job during high school, in a store that resells donated goods such as computers or tables.<sup>1241</sup> Mr. Ko is a refugee from Burma (Myanmar) and speaks three languages (Burmese, English and Arabic), and he has received awards for his customer service in the hotel.<sup>1242</sup> He received a raise last year from \$11/hour to \$15/hour, and says that he likes to “connect with other people” from different areas of the U.S. and different countries at the hotel.<sup>1243</sup> He said he feels that he can talk to his supervisor if he has any problems, and has done so regarding a co-worker who was

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<sup>1235</sup> Ibid.

<sup>1236</sup> Ibid.

<sup>1237</sup> Ibid.

<sup>1238</sup> Ibid.

<sup>1239</sup> Ibid.

<sup>1240</sup> OCRE Interview Notes, Hasan Ko (Mar. 4, 2020) (on file).

<sup>1241</sup> Ibid.

<sup>1242</sup> Ibid.

<sup>1243</sup> Ibid.

upsetting him.<sup>1244</sup> He found the opportunity working with Champlain Community Services on a job search together, then Champlain Community Services introduced him to the hotel manager.<sup>1245</sup> Mr. Ko added that he has learned skills as part of an advocacy group at Champlain Community Services in which they learn to work together in a group, share their ideas, and talk to each other.<sup>1246</sup>

- Stirling Peebles, a 37-year-old woman, explained to Commission staff that she has worked as a Dissemination Assistant at the Center on Disability and Inclusion at the University of Vermont for the past six years, and as a part-time advocacy educator at Green Mountain Self-Advocates for the past 13 years.<sup>1247</sup> She has been simultaneously studying for her degree at University of Vermont and expects to graduate in May 2020, and she referred the Commission to her LinkedIn page for information about prior jobs, including over five years at Association of People Supporting Employment First.<sup>1248</sup> Ms. Peebles stated that at the University of Vermont, she conducts outreach and media through traditional and social media; for example, she coordinates student meetings and she set up the organization’s YouTube and Facebook pages; at Green Mountain Self-Advocates she maintains a Facebook page for a large, national self-advocacy network and sometimes speaks to legislators. She makes \$12.85/hour at University of Vermont and \$15/hour at Green Mountain Self-Advocates, and she received raises in both jobs last year.<sup>1249</sup>
- When asked what she liked and disliked about her jobs, Ms. Peebles said she “loves” both of her jobs, because “I love challenges,” and she really likes the work she does.<sup>1250</sup> She says that both jobs are “very flexible with me,” and the only thing she dislikes is that she does not receive benefits due to being a part-time employee.<sup>1251</sup> She also feels that she can talk to her supervisors at both jobs. She found out about the University of Vermont job while she was a student in “the Vermont Program,” in which all are given an opportunity for a vocational internship, and she found out about the Green Mountain Self-Advocates job because she was recommended for it by one of her teachers while she was in high school, through a workshop.<sup>1252</sup> Ms. Peebles also learned skills through her educational

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<sup>1244</sup> Ibid.

<sup>1245</sup> Ibid.

<sup>1246</sup> Ibid.

<sup>1247</sup> OCRE Interview Notes, Stirling Peebles (Mar. 4, 2020) (on file) (Ms. Peebles consented to using her full name in the report).

<sup>1248</sup> Ibid.; *see also* Profile of Stirling Peebles, LinkedIn.com, <https://www.linkedin.com/in/stirlingpeebles10/> (accessed 3/31/2020).

<sup>1249</sup> Ibid.

<sup>1250</sup> Ibid.

<sup>1251</sup> OCRE Interview Notes, Stirling Peebles (Mar. 4, 2020) (on file).

<sup>1252</sup> Ibid.

programs and through internships; however, the information she provided shows that she was extremely self-directed in using workbooks, journaling and online programs to build her skillset.<sup>1253</sup> She also engages in advocacy-based leadership and was recently elected to be the Vice President of the Vermont Chapter of the Association of People Supporting Employment First.<sup>1254</sup> She also told Commission staff that among the disability community:

Everyone loves a full life and just want to be treated like everyone else.

Some parents are scared about if sheltered employment, if it were taken away. It depends on the person. It needs to be person-centered. Everyone should have choices and someone to support them, an ally.<sup>1255</sup>

In addition to the above 15 interviews of employees with disabilities, Commission staff also spoke to P.B., a 59-year-old woman who is a parent of a person with disabilities and an advocate, who signed up for the interviews, who recommended that the Commission seek to connect aging with disability because of similarities between the two.<sup>1256</sup> She talked about wanting her son who is autistic to go to college because the best thing for him is to be independent, and said that “parents need to move from concern to support.”<sup>1257</sup>

### *Maine*

Even though Maine shifted its employment paradigm for people with disabilities just a few years after Vermont, the state has not seen similar rates of increased employment for people with disabilities compared to Vermont.<sup>1258</sup> Maine began phasing out sheltered employment in 2006 through funding mechanisms, expanding funding for supported employment services while simultaneously reducing funding for sheltered employment.<sup>1259</sup> During 2016 to 2017, 24 percent of people with disabilities in Maine were employed in integrated employment, which was above the national average, but lower than Vermont’s 42 percent employment rate for the same group.<sup>1260</sup> In Maine, in 2016-2017, individuals working in integrated employment reported making an average of \$171.97 and working an average of 14.5 hours in a two week period, and both numbers

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<sup>1253</sup> Ibid.

<sup>1254</sup> Ibid.

<sup>1255</sup> Ibid.

<sup>1256</sup> OCRE Interview Notes, R.B. (Mar. 4, 2020) (on file).

<sup>1257</sup> Ibid.

<sup>1258</sup> See Chart 4.10, *supra*.

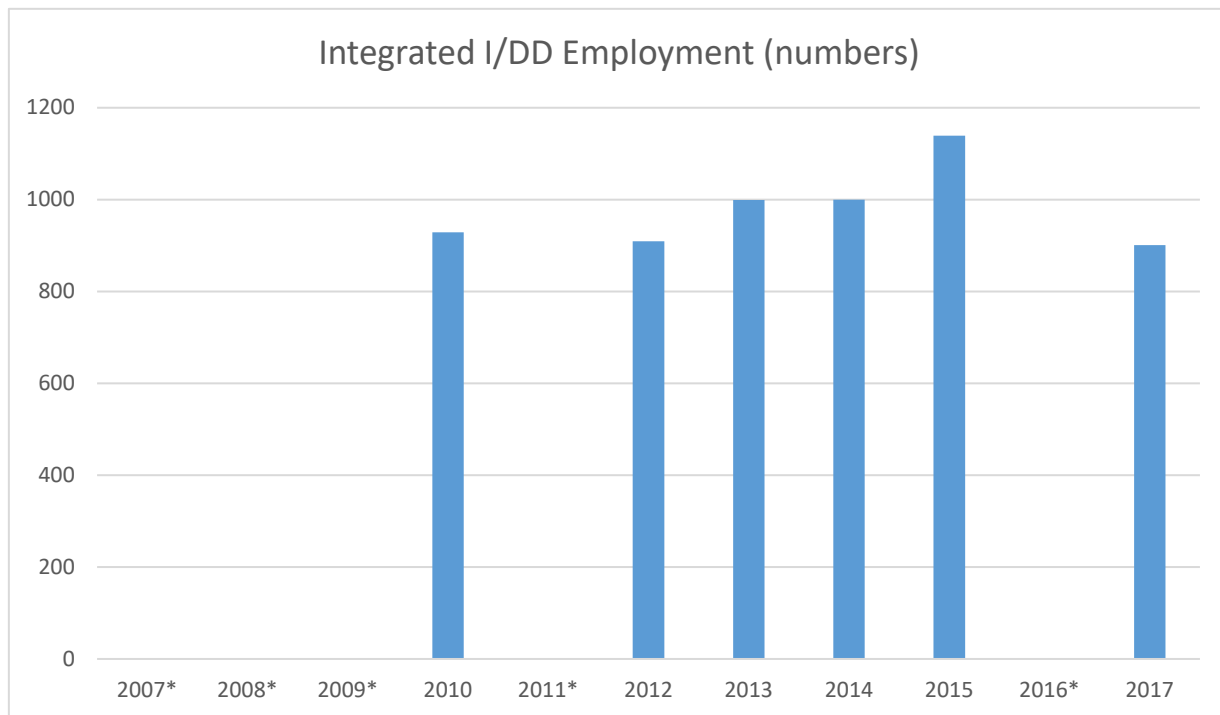
<sup>1259</sup> National Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, (Oct. 2018) p. 68.

<sup>1260</sup> UMass Boston, Institute for Community Inclusion, StateData.info, *State Employment Snapshot: Maine*, <https://www.statedata.info/statepages/Maine> (last accessed Feb. 9, 2020); See *supra*, Note 1058.

are below the national averages.<sup>1261</sup> This is consistent with Maine’s data in the comparative Overview section at the beginning of this chapter, which also showed lower wage trends than other states such as Virginia.<sup>1262</sup>

Levels of integration for persons with cognitive disabilities in Maine were difficult to determine because of a lack of data, but the available data does not show a marked increase in recent years. See Chart 4.11.

**Chart 4.11: Number of Individuals with Disabilities working in Integrated Employment, Maine (2007-2017)**



Source: UMass Boston, Institute for Community Inclusion, Statedata.info, “State IDD Agencies: Maine,” <https://www.statedata.info/data/showchart/269339>

\*Indicates data are not available for that year

Further, data from the years prior to the 2003 policy change similarly did not show an increase in integrated employment for this group. For example, in 1993, there were 454 persons with cognitive disabilities in integrated employment in Maine, and 1,386 in 2001, then 929 in 2010; however, the

<sup>1261</sup> UMass Boston, Institute for Community Inclusion, StateData.info, *State Employment Snapshot: Maine*, <https://www.statedata.info/statepages/Maine> (last accessed Feb. 9, 2020).

<sup>1262</sup> See *supra* Chart 4.2.

only data was from those years and so it may not be complete enough to reflect implications of the 2003 policy change.<sup>1263</sup>

A case study published in 2015 by the George Washington University Milken Institute School of Public Health examined Maine's transition from sheltered employment to integrated employment, finding that at one employment facility studied in the report, people with disabilities worked fewer hours after the transition than before.<sup>1264</sup> The study found that in 2001, there were 558 people employed in sheltered workshops, a number that dropped to zero by 2010.<sup>1265</sup> However, the study also found that the state's number of people with intellectual and developmental disabilities who served in integrated employment decreased between 2001 and 2014, while the number of people with intellectual and developmental disabilities engaged in non-work activities increased.<sup>1266</sup> The authors summarized, "There was a dramatic increase in the number of Maine residents who were being served with community based non-work services."<sup>1267</sup>

As part of the study, researchers interviewed representatives from seven community rehabilitation programs and five people with disabilities.<sup>1268</sup> Proponents of the 14(c) certificate program point to the Maine study as evidence that elimination of sheltered workshops can result in a decrease in employment opportunities for people with disabilities.<sup>1269</sup> However, critics of the study point to a lack of data tracking the outcomes for people with disabilities who have left sheltered employment.<sup>1270</sup> Critics of the report additionally cite to Maine's funding structure for employment services and long wait times for vocational rehabilitation services as contributing to the lower numbers for competitive integrated employment outcomes when compared to other states that have eliminated subminimum wage employment.<sup>1271</sup>

The National Council on Disability conducted a site visit to a Maine supported employment agency as part of its 2018 report. Unlike the George Washington University report, the National Council

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<sup>1263</sup> UMass Boston, Institute for Community Inclusion, Statedata.info, "State IDD Agencies: Maine," <https://www.statedata.info/data/showchart/269339>.

<sup>1264</sup> Phoenix, Janet A. and Bysshe, Tyler, *Transitions: A Case Study of the Conversion from Sheltered Workshops to Integrated Employment in Maine*, George Washington University Milken Institute School of Public Health (2015) p. 26.

<sup>1265</sup> *Ibid.*, 12.

<sup>1266</sup> *Ibid.*

<sup>1267</sup> *Ibid.*

<sup>1268</sup> *Ibid* p. 21-22.

<sup>1269</sup> See e.g. Public Comment No. 629 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights; Grothman Statement at 4-5.

<sup>1270</sup> Association of People Supporting Employment First, *APSE Statement Challenging the Validity of GWU "Study" funded by the Chimes Foundation* (July 2015) <https://apse.org/chimesfoundation/>.

<sup>1271</sup> *Id.*



on Disability found that one agency achieved employment in integrated settings for 41 percent of people served.<sup>1272</sup> Furthermore, the agency was able to engage 77 percent of people served in a community group, club, or class, and 71 percent in volunteer work in the community.<sup>1273</sup> The National Council on Disability also found that revenues in 1996, the year the employment agency ceased all segregated activities, totaled \$755,293.<sup>1274</sup> By 2019, the agency projected revenue of \$6,000,000.<sup>1275</sup> The federal agency highlighted the importance of working individually with people with disabilities to identify desired employment outcomes, a key success factor that Dr. Bryan Dague, Think College Vermont Program Coordinator and Research Assistant Professor at the University of Vermont, mirrored in his testimony to the Commission stating that “shutting down a workshop and then having people wait in line is not [an] effective use of services, it’s sort of like help[ing] one person at a time and gradually get[ting] them out.”<sup>1276</sup> The National Council on Disability highlighted the success of the Maine in using individualized employment services to find employment for two persons with disabilities. For example, one person with an intellectual or developmental disability was very interested in meticulous matching of objects by shape and size, and she was supported in starting her own vending business and is now successfully self-employed.<sup>1277</sup> In another example of employment coaching tailored to the individual highlighted in the federal report:

Another person with [an intellectual or developmental disability] who was accused of being a “slow worker” in the sheltered workshop became “a raging success” working competitively in a family restaurant. He was better matched, and therefore performed better, in a job where he could interact with customers. As a result, his paid supports were reduced to just 7 hours per week.<sup>1278</sup>

After the Commission’s briefing, a rehabilitation specialist for people with acquired brain injuries located in Maine sent a public comment explaining that people with brain injuries can work in the community with support, and should be able to seek competitive integrated employment.<sup>1279</sup>

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<sup>1272</sup> National Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, (Oct. 2018) p. 70.

<sup>1273</sup> *Ibid.*

<sup>1274</sup> *Ibid.*, at 71.

<sup>1275</sup> *Ibid.*

<sup>1276</sup> Briefing Transcript at 257.

<sup>1277</sup> National Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, (Oct. 2018) p. 70.

<sup>1278</sup> *Ibid.*, 70.

<sup>1279</sup> Public comment No. 217 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

*Oregon*

The state of Oregon is currently undergoing a transition from subminimum wage employment in sheltered workshops to competitive integrated employment, in part in response to a settlement agreement reached with the Department of Justice in 2015.<sup>1280</sup> As part of the settlement, in 2015, Oregon stopped all new entries into sheltered workshops, beginning the phase-out of subminimum wage employment.<sup>1281</sup> According to Lilia Teninty, Director of the Office of Developmental Disabilities Services, Oregon Department of Human Services, who testified before the Commission, stated wages for individuals with disabilities in competitive integrated employment averaged \$9.67 per hour.<sup>1282</sup> State minimum wage in November 2019 was \$9.25 per hour.<sup>1283</sup> In contrast, in 2015, there were 3,711 people in sheltered workshops in Oregon who earned an average of \$4.74 per hour.<sup>1284</sup>

After the change, as of November 2019, average wages for people with disabilities in Oregon working in competitive integrated employment were \$11.71 per hour, above the Oregon minimum wage of \$11.25 per hour.<sup>1285</sup> In November of 2019, 300 people remained employed in sheltered workshops, making an average of \$4.90 per hour.<sup>1286</sup> According to Teninty, payment of subminimum wages will be completely phased out in Oregon by July 2023.<sup>1287</sup>

The comparative data in the Overview section of this chapter shows that Oregon has not increased employment of persons with disabilities as much as other states, and that there has even been a drop in relevant employment rates between 2016 and 2017 (the most recent data available). However, Oregon's data about the number of persons with cognitive disabilities in integrated employment shows a positive trend. See Chart 4.12.

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<sup>1280</sup> See *supra* notes 204-211.

<sup>1281</sup> Lilia Teninty, Director of the Office of Developmental Disabilities Services, Oregon Department of Human Services, Written Statement for *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities* Briefing before the U.S. Comm'n on Civil Rights, Nov. 15, 2019, at 2 (hereinafter Teninty Statement).

<sup>1282</sup> *Id.*

<sup>1283</sup> *Id.*

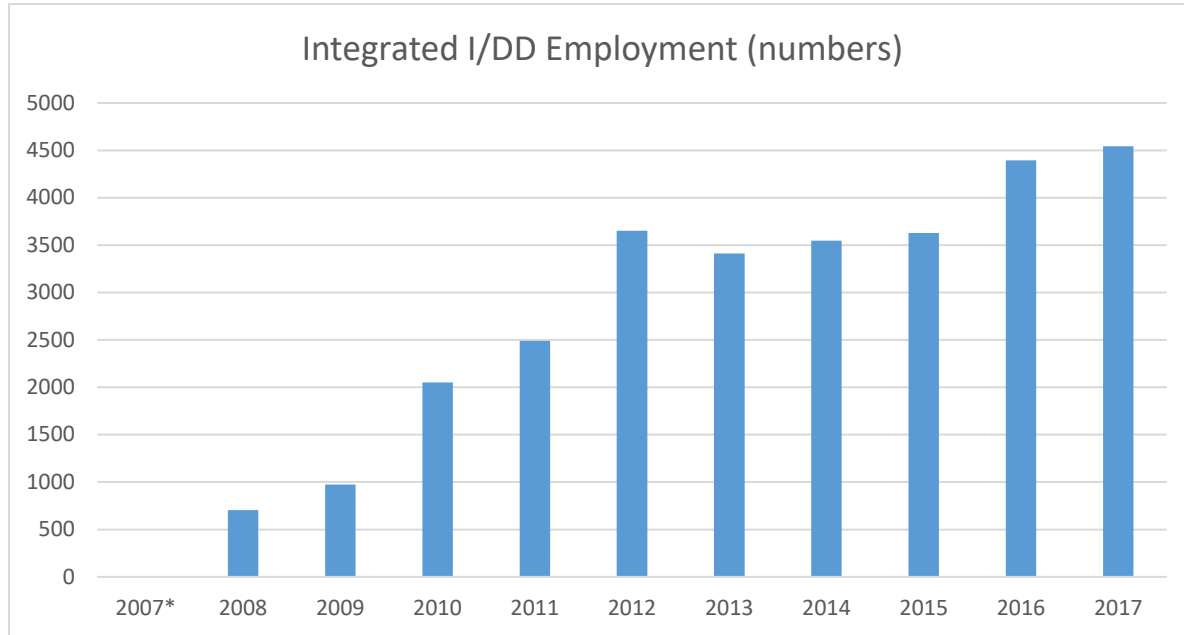
<sup>1284</sup> *Id.*

<sup>1285</sup> *Id.*

<sup>1286</sup> *Id.*

<sup>1287</sup> *Id.*

**Chart 4.12: Number of Individuals with Disabilities working in Integrated Employment, Oregon (2007-2017)**



Source: UMass Boston, Institute for Community Inclusion, Statedata.info, “State IDD Agencies: Oregon,” <https://www.statedata.info/data/showchart/575977>

\*Indicates data are not available for that year

During the Commission’s Briefing, Teninty also explained some of the challenges Oregon faces in transitioning to competitive integrated employment for all people with disabilities. She stated that funding for supported employment services and resistance to change from family members of people with disabilities are two of the biggest challenges when seeking change in Oregon’s system.<sup>1288</sup>

The National Council on Disability conducted a site visit to Oregon in 2018, visiting three locations to meet with employment service providers, disability groups, employer associations, experts, and other stakeholders.<sup>1289</sup> The federal agency’s report identified successful practices among Oregon service providers in supporting people with disabilities, including changes in organizational leadership and more training opportunities for staff.<sup>1290</sup> The National Council on Disability also found that dwindling demand for segregated employment for people with disabilities was driving

<sup>1288</sup> Teninty Testimony, *Subminimum Wages Briefing*, Briefing Transcript at 214-16; *See supra*, notes 223-228. (family expectations as challenge to employment transitions).

<sup>1289</sup> National Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, (Oct. 2018) p. 79.

<sup>1290</sup> *Ibid.*, 83.

some service providers to proactively change their service models.<sup>1291</sup> The state of Oregon provides financial transition assistance to service providers through the state's Transformation Project that allows service providers to gradually increase capacity for providing competitive integrated employment services while winding down older sheltered employment models.<sup>1292</sup>

The first Oregon workshop visited by the National Council on Disability, MV Advancements, supported 123 persons with disabilities in competitive integrated employment, 76 in small-group supported employment, and 10 with "employment path" supports in the community.<sup>1293</sup> Further, as it closed its workshops [during the transition] "of the 88 workshop workers, initially 32 people moved to small-group employment, 12 obtained integrated employment, 12 moved to day support, 2 entered job development, 13 retired or exited services, and a few are unknown."<sup>1294</sup>

The National Council on Disability also visited Tualatin Valley Workshop, which was in the process of assisting 37 persons with intellectual/developmental disabilities in transitioning to competitive integrated employment. National Council on Disability reported that:

[Tualatin Valley Workshop] faced significant resistance from families at first, but after transition, the employees with disabilities and their families report that although they thought they would never be able to work in the community, now they are happy with the results and have greater confidence, independence, and financial health, along with an improved quality of life and greater networks of colleagues and friends.<sup>1295</sup>

The National Council on Disability also visited a location in Portland where it met with the Oregon Manufacturing Extension Partnership (an association), and with stakeholders, including employment service providers, disability organizations and advocates, family groups, experts in supported employment, and the director of the Washington Initiative for Supported Employment, which provides technical assistance and employment services in Oregon and Washington State.<sup>1296</sup>

One of the main National Council on Disability findings regarding service providers in Oregon that were several years into transition from segregated, subminimum wage workshops to competitive integrated employment was as follows:

These service providers agreed that the workers in their workshops were capable of working in competitive integrated employment with the right supports and opposed any

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<sup>1291</sup> Ibid., 84.

<sup>1292</sup> Ibid.

<sup>1293</sup> Ibid. p. 80.

<sup>1294</sup> Ibid.; *See supra*, Note 524 (defining small group employment).

<sup>1295</sup> National Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, (Oct. 2018) p. 81.

<sup>1296</sup> Ibid.

suggestion that current sheltered workers should remain in workshops while new entrants were diverted to competitive integrated employment. They emphasized that no one should be left behind in the move toward competitive integrated employment.<sup>1297</sup>

Further, some National Council on Disability interviewees believed that expectations matter, and that a perception of low expectations for persons with intellectual/developmental disabilities “made some providers less willing to engage in transformation.”<sup>1298</sup> Service providers, advocates and experts also “noted that the transition to competitive integrated employment is often more difficult for people who have worked in segregated settings, not necessarily because of their disabilities, but because they have been acculturated to a workplace that differs significantly from integrated workplaces and that is not generalizable to the mainstream place of employment.”<sup>1299</sup> The report added that “disruptive behaviors, poor hygiene, and unexplained absenteeism in sheltered workshops are often allowed to continue,” and that “workshops often cultivate dependence, not only for work activities, but for meals, social activities, and transportation.”<sup>1300</sup> However, according to experts and stakeholders interviewed by the National Council on Disability, these lowered expectations were not a reason not to transition to competitive integrated employment, but rather a reason for “longer, more intensive transition services to help a sheltered employee develop new expectations.”<sup>1301</sup> Oregon experts and stakeholders also believed that transition services such as small-group employment in an integrated setting is as useful as a “temporary interim bridge,” but “with a clear expectation that the end goal is competitive integrated employment.”<sup>1302</sup>

The Commission’s research corroborates that Oregon is a good model for coming into compliance with civil rights prohibitions against segregation of persons with disabilities.<sup>1303</sup> The Oregon and Vermont experiences also show that transition from sheltered workshops to competitive integrated employment may also be accomplished by concurrently eliminating subminimum wages. As noted by the National Council on Disability, Oregon’s transition has been reliant on providing “the right supports”<sup>1304</sup> including “longer, more intensive transition services[.]”<sup>1305</sup>

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<sup>1297</sup> National Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, (Oct. 2018) p. 82.

<sup>1298</sup> *Ibid.*

<sup>1299</sup> *Ibid.*

<sup>1300</sup> *Ibid.*

<sup>1301</sup> *Ibid.*

<sup>1302</sup> *Ibid.*, 82-83.

<sup>1303</sup> *See supra* notes 201-212[in Ch. 1, discussing ADA/Olmstead/Lane case].

<sup>1304</sup> *See supra* note 1297.

<sup>1305</sup> *See supra* note 1301.

Even with those type of supports, the Commission learned during the Vermont site visit that some employers were negatively impacted when they were required to start paying minimum wage;<sup>1306</sup> however, the Vermont data show an overall increase in employment rates and earnings for persons with disabilities after the state eliminated sheltered workshops and subminimum wages.<sup>1307</sup> The Vermont site visit also revealed the stories of persons with disabilities who had formerly been employed in sheltered workshops and/or paid subminimum wages, who had been exploited and were now thriving in competitive integrated employment.<sup>1308</sup>

The Maine model has not been as successful, as the state has not seen similar rates of increased employment for people with disabilities compared to Vermont.<sup>1309</sup> Some believe that the Maine study is evidence that elimination of sheltered workshops can result in a decrease in employment opportunities for people with disabilities,<sup>1310</sup> whereas others believe the underlying reason is lack of sufficient supports for successful transition in Maine.<sup>1311</sup> Certainly, every state's economy and every locality's program impact the level of opportunity for persons with disabilities.

As discussed above, anecdotal evidence also shows that some states that are not eliminating 14(c) programs may still be providing some value, particularly from the point-of-view of concerned family members.<sup>1312</sup> Data explored in this chapter indicate that Vermont, which was the first state to eliminate 14(c), had the highest employment rate of persons with disabilities.<sup>1313</sup> But the results have been mixed as the three states studied that retained 14(c) (Arizona, Missouri and Virginia) had higher employment rates for persons with disabilities than Oregon or Maine (which have eliminated 14(c)).<sup>1314</sup> Moreover, the Commission received public comments from Missouri arguing that: "Eliminating 14(c) would put an end to Missouri's Sheltered Workshops and the

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<sup>1306</sup> *See supra* note 1137.

<sup>1307</sup> *See supra* Charts 4.1 and 4.2.

<sup>1308</sup> *See supra* notes 1157-1160.

<sup>1309</sup> *See supra* note 1257.

<sup>1310</sup> *See supra* note 1269.

<sup>1311</sup> *See supra* note 1270.

<sup>1312</sup> *See supra* notes 851-981 (comments from MVLE staff at roundtable and persons with disabilities interviewed in Virginia), 999-1002 (Arizona) and 1020-1024 (Missouri).

<sup>1313</sup> *See supra* Chart 4.1.

<sup>1314</sup> *Ibid.*

thousands of Missourians they employ would be forced into day programs costing the state millions.”<sup>1315</sup>

Yet if there is a reasonable way to eliminate discriminatory treatment of persons with disabilities, civil rights law and principles would require it to be done.<sup>1316</sup> Further, in addition to employment data, data about integration of persons with disabilities in the six states studied by the Commission show that Oregon and Vermont have been comparatively the most successful at ending segregation.<sup>1317</sup> Maine did not do as well in this metric and was surpassed by Virginia, but the same dataset showed that Missouri had lowest rate of integration was in of the six states examined.<sup>1318</sup> The success of states like Oregon and Vermont show that there is a path forward,; moreover, even concerned family members in those states eventually embraced a supported transition from 14(c) to competitive integrated employment. For example, while Tualatin Valley Workshop in Oregon “faced significant resistance from families at first, but after transition, the employees with disabilities and their families report that although they thought they would never be able to work in the community, now they are happy with the results[.]”<sup>1319</sup> This was similar to experiences in Vermont, where the Commission received testimony that:

Families who originally said, my adult child won’t be safe in the community, were able to see the transition of their adult child and see that they became more independent, that they became more communicative, that their wellness was improved, that the community was embracing them because they’d been given an opportunity. And it was a leap of faith.<sup>1320</sup>

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<sup>1315</sup> Email of State Sen. Gary Romine to U.S. Commission on Civil Rights (Dec. 11, 2019); Letter of State Rep. Dale Wright to the U.S. Commission on Civil Rights (Dec. 4, 2019); Letter of State Rep. Mike Henderson to the U.S. Commission on Civil Rights (Dec. 5, 2019) (all on file) (letters of State Representatives were identical in their text).

<sup>1315</sup> Letter of State Rep. Dale Wright to the U.S. Commission on Civil Rights (Dec. 4, 2019); Letter of State Rep. Mike Henderson to the U.S. Commission on Civil Rights (Dec. 5, 2019) (both on file; both identical in their text).

<sup>1316</sup> *See supra* notes 178-190 (Applicable Civil Rights Law, discussing Titles I and II of the Americans with Disabilities Act).

<sup>1317</sup> *See supra* Chart 4.4.

<sup>1318</sup> *Ibid.*

<sup>1319</sup> National Council on Disability, *From New Deal to Real Deal: Joining the Industries of the Future*, (Oct. 2018) p. 81.

<sup>1320</sup> *Ibid.*, 75-76

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## CHAPTER 5: FINDINGS AND RECOMMENDATIONS

### Findings

1. In 1938, Congress enacted the exception to the minimum wage requirement for people with disabilities, contained in Section 14(c) of the Fair Labor Standards Act, with a rehabilitative purpose. As currently utilized, the federal Department of Labor has repeatedly found providers operating pursuant to Section 14(c) limiting people with disabilities participating in the program from realizing their full potential while allowing providers and associated businesses to profit from their labor. This limitation is contrary to 14(c)'s purpose.
  - a. People with disabilities testified to the Commission about the harm to their dignity resulting from being paid a subminimum wage in a segregated setting and not being treated as equal members of the community while earning subminimum wages.
  - b. The continuation of business relationships and successful fulfillment of contracts by 14(c) workers indicate the productive capability and capacity of workers with disabilities and their ability to participate in the economy.
  - c. Some Community Rehabilitation Providers operating with 14(c) certificates are able to turn substantial profits and returns for their corporate officers while paying workers with disabilities less than minimum wage.
  - d. Businesses who contract with Community Rehabilitation Providers benefit from decreased labor and benefit costs.
  - e. As 14(c) certificates are issued for 2-year periods that may be repeatedly renewed, people can and often do remain in the program for decades with little movement to other or different jobs, contrary to the program's purpose of skill-building, preparing and/or increasing work readiness, and transitioning people with disabilities to mainstream employment.
  - f. People with disabilities working under the 14(c) program are not permitted to unionize.
  - g. For some purposes, such as wage determination, people with disabilities in 14(c) programs are considered employees; however, for other purposes, such as when accessing their Medicaid benefits, they are considered program participants, with the Community Rehabilitation Provider overseeing both roles. This dual status creates confusion about the status, rights and entitlements of people with disabilities in 14(c) programs.
2. Persistent failures in regulation and oversight of the 14(c) program by government agencies including the Department of Labor and Department of Justice have allowed and continue to allow the program to operate without satisfying its legislative goal to meet the needs of

people with disabilities to receive supports necessary to become ready for employment in the competitive economy.

- a. Congress has not granted specific jurisdiction to any civil rights enforcement office for civil rights oversight of the 14(c) program and the documented civil rights concerns that the operation of the program raises, and no federal civil rights enforcement office has taken direct responsibility for such oversight since 1938.
- b. The U.S. Department of Labor Wage and Hour Division is not a civil rights enforcement office and does not have jurisdiction to enforce civil rights violations, but it is the only office charged with active oversight of 14(c). This statutory design as well as actual enforcement practice results in insufficient oversight of the civil rights issues attendant to operation of 14(c).
- c. Notwithstanding the longstanding existence of the law, the Wage and Hour Division of the Department of Labor did not begin its current more rigorous enforcement practices with regard to the 14(c) program until the last 10 years, in response to calls for stronger enforcement from the U.S. Government Accountability Office and the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities. In the last 10 years, during which the Wage and Hour Division investigated between 3% and 14% of 14(c) certificate holders, the Division consistently found violations in more than 80% of the cases it investigated. It took more than 60 years for the Division to finally revoke its first certificate in 2013.
- d. The Wage and Hour Division does not collect information from certificate holders to determine how many people with disabilities participate in the 14(c) program at any moment in time. Estimates range from 110,000 to more than 400,000 people. The Commission received testimony that the historic lack of data on workers with disabilities – and people with disabilities more generally – has been indicative of a general failure to account for an important community.
- e. The Wage and Hour Division does not track or require:
  - Individuals in the program to determine how long they have been working in a 14(c) job;
  - Whether individuals, in fact, gain any additional skills and what those skills are while participating in the program;
  - Whether individuals can move from, for example, an assembly job to one that uses modern technology;
  - Compliance with the Americans with Disabilities Act including whether individuals are afforded the benefits of reasonable accommodations under the American With Disabilities Act to improve their productivity and skill level;

- Whether workers and their relatives are adequately and professionally counseled in a manner such that the individual understands the options that they may have at future employment opportunities in the broader economy;
  - How many individuals move out of 14(c) jobs into competitive integrated employment;
  - Whether the programs developed by the Community Rehabilitation Providers are successful in the goal of readying people with disabilities for competitive integrated employment.
- f. While the Department of Justice and the Equal Employment Opportunity Commission have jurisdiction to enforce the requirements of the Americans with Disabilities Act, there is no specific office charged to oversee Americans with Disabilities Act compliance among 14(c) certificate holders. The Commission's research and testimony the Commission received indicates a high level of concern that Community Rehabilitation Providers do not voluntarily institute and use adaptive assistive devices and technology an employer would be required to provide pursuant to the Americans with Disabilities Act to advance the skills of people with disabilities so they can enter competitive integrated employment with a work ready set of skills.
- g. Wage and Hour Division oversight of the requirements in Section 511 of the Rehabilitation Act are limited to certifying the fact of counseling required under Section 511 took place and not any other metric, such as length of time of counseling, training of counselors, or whether counselors take any measures to tailor counseling to the individuals, or subject matter of the counseling. The Commission heard testimony reporting annual counseling sessions as short as 10 minutes are now occurring without oversight.
3. 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.
- a. People with disabilities, including those with significant disabilities, work for competitive wages in mainstream workplaces and are successful at their jobs.
  - b. People previously categorized for decades as "unable to work" have nevertheless obtained and maintained competitive employment through the opportunities of the ADA, new technology, and funding for and commitments by vocational rehabilitation specialists to seek out mainstream employment. For example, many people with disabilities have found success performing work in new jobs created in the tech economy, as well as employment in more conventional positions.

- c. Paying low wages to people with disabilities harms their economic potential, increasing the likelihood that they will remain reliant on state and federal support.
4. The Commission took in bipartisan testimony in favor of keeping the 14(c) program and to end the 14(c) program. Notably, in 2016, both major party platforms included support for legislation ending the payment of subminimum wages to people with disabilities. House Committee on Education and the Workforce Chairman Bobby Scott (D-VA) introduced bipartisan legislation to phase out the 14(c) program. Chair Neil Romano, Republican appointee to the National Council on Disability, and former Republican Governor Tom Ridge, who now leads the National Organization on Disability, both testified that ending the 14(c) program is their shared highest priority.
5. State-level phase outs of the use of the 14(c) program have been developed and designed 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.
  - a. 14(c) providers, participants, and family members of participants, specifically parents, provided testimony that 14(c) programs provide essential services and opportunities for those with disabilities, beyond the mere opportunity for work, and expressed significant concern that change to the 14(c) program would adversely impact participants and their families.
  - b. Crucial services for people with disabilities prioritized in phase out plans include, but are not limited to, transportation options for people with disabilities, need for medical supervision in some cases, and options facilitating continuation of community that would result from leaving a job which people may have held for years.
  - c. Testimony and research showing successful employment outcomes in Vermont, a state that has moved away from 14(c), suggests that a successful transition to competitive integrated employment requires significant investments in time and planning to ensure implementation of strategies like ongoing education and training of staff and involvement of stakeholders.
6. Increased integration of people with disabilities into the workplace and society is now legally required by the Americans with Disabilities Act and legal precedent, and is facilitated by technological advancements. These developments obviate any need for subminimum wage work.

## Recommendations

1. Congress should repeal Section 14(c) with a planned phase-out period to allow transition among service providers and people with disabilities to alternative service models prioritizing competitive integrated employment.
2. The phased repeal of 14(c) must not reflect a retreat in Federal investments and support for employment success of persons with disabilities but rather a reconceptualization of the way in which the federal government can enhance the possibilities for success and growth for people with disabilities.
3. Congress should expand funding for supported employment services and prioritize capacity building in states transitioning from 14(c) programs.
  - a. Funding structures should seek to ensure people with disabilities working in 14(c) programs will continue to receive employment services, job development, job coaching and other services when 14(c) programs are no longer available. Such funding should include continued support for services outside employment settings, such as volunteer work, training, continuing education, resource centers, and other skill-building activities so support is available to people with disabilities in activities that partake in and contribute to society.
  - b. As a condition of receiving expanded funding, Congress should require states to submit a plan to phase out 14(c) that allows for a gradual transition to alternative service models, such as phasing in such models on a regional basis within their jurisdiction with specific goals and timelines. This plan should ensure all current 14(c) participants are fully covered with options to receive services during the hours they participated in a 14(c) program.
  - c. Congress should provide funding to Vocational Rehabilitation agencies to evaluate every 14(c) participant with the goal of determining the services they would require to gain skills to be successful in competitive integrated employment, if the person with disabilities expresses an employment goal. This planning process should include trial work experiences with reasonable accommodations and assistive technology as necessary. Families and other support individuals should be included in this planning process at the discretion of the person with disabilities.
4. Now and during the transition period of the Section 14(c) program, Congress should assign civil rights oversight responsibility and jurisdiction, with necessary associated fiscal appropriations to conduct the enforcement, either to the Department of Labor or to the Department of Justice Civil Rights Division. Congress should also require that the designated civil rights agency issue an annual report on investigations and findings regarding the 14(c) program.

5. During the phase-out period, Congress should require more stringent reporting and accountability for 14(c) certificate holders, and following the phase out should continue to collect data on employment outcomes of former 14(c) employees.
  - a. Until 14(c) is phased out, Congress should enact more stringent requirements for counseling under Section 511 of the Rehabilitation Act to mandate a robust counseling and planning process which incorporates current requirements and additional planning for a transition away from 14(c). It should require counselors to work with the person with disabilities and, where appropriate, family members review what jobs are available for the person, the skills the person has acquired, what skills the person would need to be successful, what actions need to be taken to acquire those skills, and all services that would be available to the person outside of competitive integrated employment, including, but not limited to medical services, transportation, day services, volunteering positions and society. The Rehabilitation Services Administration should collect data on implementation of the counseling requirements, the employment outcomes of Section 511 counseling, and on what services are offered to people with disabilities who indicate an interest in pursuing competitive integrated employment.
  - b. Until 14(c) is phased out, Congress should require all Community Rehabilitation Provider 14(c) certificate holders to report at least every six months on how many individuals transitioned to competitive work or to a prevailing wage position, and how many remained in 14(c). Officers and employees of Community Rehabilitation Providers should be required to disclose any ownership interest and any income derived from, whether owned directly or owned indirectly, through a corporation or any other business entity or marital or family property any interest in real or personal property utilized by the Community Rehabilitation Provider or its clients who participate in any of its programs, including, but not limited to group home ownership, associated services to the disabled individual such as money management, payee fees for social security payments, or accounting for social security payments.
  - c. After the full phase-out is complete, Congress should continue to require the collection of data on the employment outcomes of people previously working subminimum wage jobs to determine if further federal action is needed to support former 14(c) employees in accessing services.
6. The Department of Justice should increase enforcement of the *Olmstead* integration mandate to determine whether more state systems are inappropriately relying too heavily on providers using 14(c) certificates to provide non-integrated employment in violation of *Olmstead*. The Department should issue guidance, open more investigations, and litigate where voluntary compliance cannot be achieved.

## Commissioners' Statements, Dissents, and Rebuttals

### Statement of Commissioner David Kladney

Through the course of this project, we took in a great deal of information from all corners. An unprecedented (to my knowledge) level of engagement with the Commission meant we received the full picture of the contours of the debate around the 14(c) program. We heard from self-advocates in the disability community, service providers who use 14(c) certificates, parents and caregivers of people with significant disabilities, scholars, practitioners, data analysts, and lawmakers. Through it all, the same serious concerns resurfaced in various forms. People with disabilities seek to meet their personal goals. Family members and caregivers seek certainty that services will be available and those with disabilities will be safe and secure. Service providers seek continuity in their offerings during a time when it seems the economic reality might shift under their feet. We took none of these concerns lightly.

What struck me throughout this endeavor were the individuals with disabilities who spoke frankly to us about their own ideas for their futures. One person asked how I would like to be told I would only ever be able to work in a workshop or menial job, when in fact that person was attending college. That is the real question at the heart of the debate about the 14(c) program. Is 14(c) a stepping stone to real employment, or is it simply something for people with disabilities to do during the day in a society that doesn't really value their potential contributions, operating only to exclude and make them invisible to society?

I was also struck by the economics of some of the providers who use 14(c) certificates. They are able to run very profitable businesses. It can't be ignored that the foundation of much of that profit is their lower labor costs and government assistance, and yet someone is producing the work to fulfill the contracts. People with disabilities are. Since the contracts are being filled, it must be the case that people with disabilities are working hard, contributing, and successfully performing the work required. It seems to me they should have an opportunity to do so outside of the 14(c) ecosystem, where they have a chance for advancement in their job, independence, inclusion and upward mobility. I don't see that happening in the closed environment of the workshops.

We visited a 14(c) provider who does not use a workshop model. MVLE<sup>1</sup> explained to us that they run a labor contracting operation where they fulfill the labor needs businesses have through

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<sup>1</sup> MVLE is a subsidiary of FedCap Rehabilitation Services, Inc. a New York based collection of various non-profit corporations, tax exempt under 501(c)(3). It is the sole member of MVLE, Inc. a membership corporation under the laws of Virginia, and also owns many other non-profit businesses providing a variety of work force development services. FedCap has the power to appoint all members of the MVLE board of directors and its executive director. MVLE's gross revenue in 2018 was \$3.5 million, in 2017 it was \$14 million (This was the year FedCap purportedly became the sole member of MVLE), and in 2016 it was \$14 million. FedCap's gross revenue in 2017 was \$190 million. FedCap additionally appears to own a for-profit food service corporation in New York City.

supported employment for people with disabilities, some, a few, of whom have lower productive capacity and are therefore paid less than minimum wage through the 14(c) program. MVLE additionally provides on-site employment through their “business center,” which they informed us was not a 14(c) program, although a parent at the roundtable described her son shredding paper at MVLE as an example of why the 14(c) program is necessary. We did not really get to see their 14(c) program, because they claimed they couldn’t show it to us. Even though they had agreed to prior to our visit and after they were well aware the sole purpose of our visit was to see a 14(c) program and had numerous logistical conversations, on the day we had set aside to see the program, it was suddenly impossible to see anything other than one employment site (not a 14(c)-only site), where we were told there was one worker earning a subminimum wage.<sup>2</sup> I would note here, we had also indicated prior to our visit that we would benefit from seeing the day services MLVE provides, and while at MVLE I twice asked the executive director to see the Day Services Programs. She never showed it to us.

The fact that the service provider took this approach left us without much evidence of the benefits they described. Although MVLE has since claimed we did not provide them sufficient opportunity to view their operations, leaving us with a skewed view, MVLE in fact was held up by ACCSES, a 14(c) trade association, as a representative program. I would note the Commission’s Office of Civil Rights Evaluation made the same determination separately, prompting our visit. I would also note, if we knew MVLE was not going to allow us to see the 14(c) program or the Day Services program, we would not have visited. By the way, an ACCSES representative was present during the entire visit, in an apparent attempt to influence our views.

In our on-the-record discussion while on site at MVLE, it became clear that expectations are low for the possibility that people with disabilities could earn a real paycheck in competitive integrated employment. And yet, the people we did see at the employment site were hard at work, doing necessary jobs anyone else would be fully compensated for in a competitive environment. I was particularly impressed with the dishwashers. They were working independently, without supervision, the entire period of time we were at the site. This position takes quite a bit of coordination, organization, and motivation. It is not a simple one-and-two step position. I have personal real-life experience in this area having held a commercial dishwashing position myself. The other 8 to 10 employees with disabilities were preparing the setups for the next meal at the facility we visited. Afterwards they were also going to set up the dining room for the next meal. A job coach was overseeing the work, but again, most all the employees were working independently.

Most all of the people with disabilities we observed are earning prevailing wages for their labor. It appears MVLE is acting as a labor contractor. From the short time we observed, I could see

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<sup>2</sup> Subsequent to the visit, we received a letter stating MVLE personnel were mistaken and there were three 14(c) participants at the site.



most, if not all, of these people with disabilities working in competitive integrated employment in the service industry with and without a job coach.

The national 14(c) program as a whole lacks oversight into whether people working in it would be successful in integrated employment. It would be one thing if a very narrow program paying some people less than minimum wage while they built the necessary skills to succeed in competitive employment were closely regulated and tracked so that it fulfilled its goal and stated purpose. That is not the situation in America now. Oversight of the 14(c) program is not robust or coordinated across government agencies. It's the wild west. In more than 80 years the program has been in existence, who has kept track of how many people with disabilities have transitioned out of the workshop to competitive employment? Why aren't these 14(c) providers held to the requirements of the ADA where they would make reasonable accommodations for disabilities thus training and allowing the people with disabilities to be more productive? Why aren't they required to provide assistive technology to people they are rehabilitating? Yes, let's not forget that rehabilitation is the purpose of the program. That's why it is supposed to exist.

Oh, and why doesn't anyone know how many people with disabilities are in 14(c) programs around the country? Shouldn't we have this basic fact? Providers are now required to certify their 14(c) participants receive job counseling on other employment options and services that may be available to them. Why can't anyone tell us how effective this counseling is across the country? Why don't we know what happens next after someone expresses a desire to work outside of 14(c) in a competitive integrated job? Why aren't there any requirements for standards that make up adequate counseling? Why haven't the 14(c) providers pushed for and encouraged this?

People with disabilities are left to navigate on their own and advocate for themselves, largely at the mercy of the state they happen to live in and how the state has determined to structure its programs. Some states have much better programs than others. Some states default to 14(c) jobs and seem to have a lack of understanding that anything else could be possible.

Today, advancements in assistive technology open up ever more opportunities for people who once would not have been able to communicate or be integrated into a worksite to do so seamlessly. A lack of imagination about employment for people with disabilities is inexcusable. Flexibility is called for, not a rigid, backward-looking approach that a workshop job is the only feasible outcome. We heard from many people with disabilities about how a more flexible approach enhances their quality of life. Perhaps it's a part time job and continuing education. Perhaps it's a full-time job with full benefits at Microsoft, with accommodations that allow equal earning potential to any other employee. Perhaps the real barrier is transportation (the government provides funds for this), and as long as they can get to where they are going, they can volunteer or attend classes at a resource center regardless of whether competitive employment is possible for the few who cannot work competitively. Undeniably, some people with disabilities will always need some

level of support as they integrate into the community in their preferred fashion. The government should and does provide that support.<sup>3</sup>

I do not think the service providers and lawmakers who are adamant they must maintain the 14(c) program do so out of any ill will toward people with disabilities. They are simply trying to maintain their programs. They are skeptical anything substantial will replace the systems they have in place. I can understand this skepticism. Structural change in government programs is not guaranteed to be a success. Look at the de-institutionalization movement, which undeniably had decidedly mixed outcomes for the people it sought to help. The point of eliminating 14(c) is not to put the service providers out of business but to let them truly be service providers rather than manufacturing plants. These organizations can continue to provide the kinds of services they do now, just in a different form. They can still job develop, job coach and teach job skills in a competitive environment while getting paid for it. In fact, whether or not the government acts to eliminate 14(c), the economy is changing. The jobs traditionally found in these workshops are rapidly becoming obsolete, with automation surging throughout the economy. There is a cost, too to the government of continuing to support people in jobs that do not allow them economic self-sufficiency. For their lifetime, the government has chosen to pay them benefits rather than assisting them to support themselves. What is the fiscal cost of this forever subsidy?

With their looming obsolescence, 14(c) providers are attempting now expand their operations into other areas, but in a way that ultimately keeps people with disabilities from competitive integrated employment. This is the wrong approach. They wish to expand the AbilityOne program which offers federal contracts at prevailing wage and a profit to “companies” who staff their work crews with at least 75% of people with disabilities. This is still not competitive integrated employment. They put forth labor contract programs as MVLE showed us. **These programs only go to prove thousands of people with disabilities can work in competitive employment.** We saw it at MVLE and heard it at our briefing from a representative of Melwood, a former 14(c) provider now primarily employing people with AbilityOne contracts. Melwood stated its employees with disabilities working on AbilityOne contracts not only thrive at entry level work they commence performing, but excel to become crew supervisors and more. Why keep these thousands of people segregated? They should be given the opportunity to compete. To do any less keeps people with disabilities trapped outside of the benefits of an integrated competitive system where advancement is possible.

The cost I am most concerned about, however, is the cost to people with disabilities in a program that artificially limits their potential. I came to this project with an open mind. As we come to the end, I am convinced there is a better way than paying subminimum wages to support people with

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<sup>3</sup>As we noted in the report, Medicaid, Vocational Rehabilitation, and state-level disability services spend more than \$90 billion per year on services to people with intellectual and developmental disabilities, the primary population in the 14(c) program. Report at p. 45.

disabilities. The 14(c) program must end. Then, this better way can be built in every state in the country. We do not want to leave people out in the cold with no job, no services, no options. The scholarship, research, and practical experience of people in this field have shown many different ways to build the necessary infrastructure for transition that does not abandon anyone. The serious concerns about a change are real concerns, and they must be addressed, but we cannot be so intimidated by change that we fail to have vision for anything more.

Transition is not just flipping a switch. States must plan and the federal government must coordinate. Our recommendations encompass that states should transition in a manageable way, such as an individual state transitioning region by region. The states that have transitioned can provide guidance. Oregon and Vermont are states that cover urban, suburban and rural spectrum—real life, not academic models if you will. Providers in their states did not go out of business. They still offered the same services of job training, job development and job coaching to people with disabilities, just without the headache of running a complex, old-fashioned, out-of-date production business. It will allow the providers to train people with disabilities on the newest assistive and production technology while allowing these workers access to the reasonable accommodations through the ADA which is currently not afforded them with 14(c) providers. All this will make these workers with disabilities more productive and more competitive in a capitalistic world.

The youngest people we heard from had the strongest grasp of this vision. They have come of age with the ADA firmly in place, with integrated special education services at school, and they fail to see why they can't continue to learn, grow, work, and live independently to the fullest extent. I am inspired by their vision. I hope we can craft our policy to live up to it. It's time for change. It's time to end 14(c).

### Dissenting Statement and Rebuttal of Commissioner Gail L. Heriot

In our Age of Wokeness, the moralizing tone that this report takes has become all too familiar. But it is entirely uncalled for.

The issue before us is one of practical economics, not one of morality. We all want adults with Down syndrome and other serious intellectual and developmental disabilities to have happy and fulfilling lives. As a nation we are committed to help bring that about. Where we differ is on how to achieve that goal.

Should the program created by Section 14(c) of the Fair Labor Standards Act remain in place? Or should the federal government get rid of it? Given that the program is *optional* for disabled persons, I view this issue as easier than most questions faced by the Commission.

Section 14(c) was adopted in 1938 at the same time as the first federal minimum wage. Back then it was believed—no doubt correctly—that a federal minimum wage would cause many disabled persons to become unemployable. An exception was thus created. A limited number of employers would be permitted to obtain certificates authorizing them to pay disabled persons something less than the minimum wage. Under current law, how much less depends upon stringent tests of each such employee’s productivity, which must be conducted every six months.

Many of these disabled persons are employed in “sheltered workshops,” while others are employed in integrated settings. If we keep Section 14(c), they will be able to continue to work for the special minimum wage. If we don’t, sheltered workshops will likely disappear, and disabled individuals will be limited to taking non-sheltered jobs that pay at least the minimum wage. To get those jobs, they will have to compete with non-disabled workers.

Overwhelmingly we are talking about individuals with Down syndrome and other serious developmental disabilities. Right now the law allows them (or their guardian) a choice. They can take a mainstream job at a higher wage if they prefer that and can find an employer willing to hire them. If they prefer sheltered employment and have a willing 14(c) employer, they can choose that.

Nobody understands the issue better than the parents of the men and women currently employed in Section 14(c) programs. They aren’t just the ones who love them best. They are the ones who know their capabilities, likes, and dislikes best. That’s why it is shocking to me that **the report waits till page 99 (by which time nearly all Members of Congress have stopped reading) to mention that 98 per cent of the members of the public who submitted comments to the Commission support the continuation of Section 14(c).**

In my thirteen years on the Commission we’ve never received anything like the number of comments we got with this report—9,700. Indeed, the report admits that this is the highest number the Commission has ever received. Of them, the overwhelming majority were from parents or other close family members. Almost all of them disagreed—often *vehemently*—with the

Commission's conclusion on what is best for their child. It would be difficult to find an issue for which comments were more lopsided.

Some of the parents come close to begging the Commission to leave Section 14(c) in place. One mother wrote us, "There are people who think they know what is best for my son. They are wrong." She describes with honesty and compassion the difficulties of caring for an adult son with the intellectual capacity of a four-year old. Another mother describes her son as a slow worker who requires monitoring and who is prone to temper tantrums in the middle of the day. These women know their sons are not going to be earning a competitive wage. They are not interested in chasing rainbows and unicorns. For their sons, it is a sheltered workshop at less-than-minimum wage or no job at all.<sup>1</sup>

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<sup>1</sup> One mother that we spoke with at MVLE on March 2, 2020—Catherine Pennington, an MVLE board member—was also realistic about her son's prospects in the job market: "When he works for me around the house, he needs a lot of supervision. ... For example, if he goes to mow the lawn, when he's done, there will be tufts of grass here and there. He will not have gone to the edge of the lawn, and even when I point things out to him, he won't necessarily understand that [he] didn't quite get it right. ... Steven's never going to get faster. He's probably never going to become more thorough than he is now, so if he were to try and compete in the market with people who have no disabilities, he would not do well. ... [I]f the minimum wage were to rise significantly, or even a little bit, I expect that Steven would become unemployed." Tr. at 21.

Commissioner Kladney's Statement sounds sunny and optimistic about the ability of Down syndrome employees to work independently at Greenspring (a senior/assisted living facility that contracts with MVLE to furnish 14(c) workers). Commissioner Kladney is often a sunny and optimistic guy, and I appreciate that. But that's not what I was hearing there from people with experience. The MVLE job coach at the Greenspring site (if I can read my handwritten notes her name was Barbara) told us that these special employees tend to forget things, especially on Mondays. They have to be re-taught over and over again. We were told by another Greenspring employee that that the special employees need to be constantly helped and that a change of manager can be traumatic for them. In food preparation, they must be kept away from anything hot. These are not your average unskilled workers. Policy has to be grounded in that reality.

In this vein, I should point out the testimony of John Anton at our hearing. Mr. Anton has Down syndrome. He also is a Legislative Specialist with the Massachusetts Down Syndrome Congress. With help from a coach, he testified on behalf of the Massachusetts Down Syndrome Congress and the National Down Syndrome Society on November 15, 2019. Among other things, he related that he had had once worked in food service, but quit the job, because he didn't find it challenging. His current job allows him to lobby for legislation that would benefit those, like him, who have Down syndrome. Mr. Anton put it in terms of wanting to carry a briefcase and wear a suit. He stated:

"... I have learned how to dress professionally, develop a self-advocacy presentation, and I wanted to have a job where I could wear a suit and tie and carry a briefcase and be a professional like my dad who was a teacher.

(Transcript at 135.)

No one in his right mind would think that the U.S. Commission on Civil Rights—with its mere two days of fieldwork on this issue—has better insight than these mothers have into what is best for their sons.<sup>2</sup> It's absurd. Indeed, my colleagues on the Commission must know it's absurd. Why else bury the fact that 98% of the commenters were in favor of 14(c)?

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Mr. Anton was quite impressive. Insofar as his job is to model what Down syndrome employees might be able to do, I believe he is very effective. On the other hand, the fact that he can get hired by the Massachusetts Down Syndrome Congress doesn't mean that Ms. Pennington's son can get hired that way. See Margaret Snowling, Hannah Nash & Lisa Henderson, *The Development of Literacy Skills in Children with Down Syndrome: Implications for Intervention*, DSE Library (July 2, 2008) ("Reading skills are often an area of relative strength for individuals with Down syndrome. Most children with Down syndrome acquire literacy skills, although a great deal of variability exists in the level of achievement obtained.") available at <https://library.down-syndrome.org/en-us/research-practice/online/2008/development-literacy-skills-down-syndrome-implications-intervention/>.

The point is that we need to be realistic. **Anyone who argues that the solution to our problem is to find jobs for men and women with Down syndrome where they can “dress professionally” and “carry a briefcase” is being frivolous. Unrealistic policies recommendations have become surprisingly common these days. But they are unhelpful.**

<sup>2</sup> **Commissioner Kladney complains that MVLE did not allow us to see its Section 14(c) paper shredding workers on site. But he forgot to say why: Shortly before we were to see them, we were told that one of the workers had suffered from a seizure.** I have no reason to doubt that such a seizure had occurred. This unfortunately is common with Down syndrome and with some other severe disabilities. Sometimes emergency medical services have to be summoned to deal with the seizure. I don't know whether that was the case this time. But a parade of Commissioners and Commission staff members would only have been in the way. I don't recall Commissioner Kladney or anyone else suggesting otherwise.

Kladney also complains that MVLE did not “allow us to see” its day care facilities. This is nonsense. First, our entourage did get to see a rehearsal of “Everyday Oz” there at the MVLE offices, which is part of the daycare program (and was really quite a treat). “Everyday Oz” is described on the [Kennedy Center web site](#) this way:

Everyday Oz is a family-friendly performance and demonstration that partners individuals with disabilities with professional performers for an engaging show. Equal parts zany and poetic, Everyday Oz include active audience participation to reveal the many ways that we are smart, compassionate, brave, and creative ... every day!

It was extremely touching to see the professional actors and volunteer director working together with disabled individuals to make this drama come alive. We were told that they were preparing for performances in Springfield and Chantilly. Given the pandemic, I assume these performances were cancelled. But it's a shame.

It is elementary economics that if the price of something is increased, the quantity demanded will tend to decrease. Labor is no exception.<sup>3</sup> This is particularly true for unskilled labor. Modern history has been unkind to unskilled workers. Where restaurants used to need armies of dishwashers, now they need only a few to operate their highly efficient dishwashing machines.<sup>4</sup> Where fast food outlets used to need many cashiers, now they get by without them and take orders with tablets. It doesn't take a labor economist to tell you that the demand for unskilled labor of

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Second, I spoke with April Pinch-Keeler, MVLE's president and CEO, about the accusation that MVLE "did not allow" us access to its day care facilities. She was stunned. MVLE had been repeatedly told that our group was on a very tight schedule and that we absolutely had to be able to catch a plane for Burlington, Vermont that afternoon. Bear in mind that in planning our visit MVLE had logistical concerns (the rest of the day care operations were in a different building) as well as HIPAA considerations. MVLE thought it was doing a good job of satisfying the Commission's last minute requests (or as many of them as possible) and still staying within the quick time frame we gave them.

By the way, Ms. Pinch-Keeler assured me that Commissioner Kladney is wrong to suggest that MVLE's scanning and paper shredding work site does not employ Section 14(c) workers. Some of the workers there are indeed employed pursuant to Section 14(c). Commissioner Kladney suggested that the mother we talked to who pointed to the paper-shredding operation as a reason to retain the 14(c) program must have been misinformed. But it is apparently Commissioner Kladney who is misinformed.

<sup>3</sup> If we could raise the minimum wage without increasing unemployment, we'd have long ago set the minimum wage to \$1,000,000 an hour and made everyone rich. But it just doesn't work that way.

<sup>4</sup> Commissioner Kladney reports that he was impressed with the dishwashers he saw and points out that he was once a dishwasher himself. *Exactly*. At one point in his life, Commissioner Kladney, a future distinguished trial attorney, would have been counted as among the competitors for the job of dishwasher. **If the choice is between a young David Kladney and a young man or woman with Down syndrome at the same wage, just who do you think will get the job?** This is especially so in places like Washington, D.C. (\$14/hour), Seattle (\$16.39/hour for large employers, \$15.75/hour for small employers), and Portland, Oregon (\$13.25/hour). I note for the record that the supervisor that we talked to at Greenspring ("Jason" according to my barely legible handwritten notes) told us that it also hires high school students for some of its unskilled labor requirements. I suspect that some of those high school students are future distinguished trial attorneys—much like a 17-year-old David Kladney—and pretty quick on the uptake.

Kladney also points to the individuals who were "preparing the setups for the next meal." He states that "anyone else would be fully compensated in a competitive environment" for doing these jobs. Not quite. Remember that we were at a senior/assisted living facility. A few years ago my late mother was at such a facility, where nearly all the residents had the kind of small or moderate cognitive deficits common to extreme old age. The facility was expensive and most Americans could not have easily afforded such care. The facility had the residents helping with the setups. It kept costs down, and I'm sure the families of many of the residents were grateful for that and for furnishing the residents who volunteered with something useful to do.

Down syndrome adults is not infinitely inelastic. If the price goes up, the number of jobs will go down.<sup>5</sup>

Even zealous advocates of terminating the so-called “subminimum wage program” admit that its elimination results in lost jobs. Vermont has eliminated sheltered workshops and Section 14(c) wages. The subcommittee had a roundtable meeting with various advocates of Vermont’s decision in Burlington, Vermont on March 3, 2020. At that meeting, I asked whether fewer individuals had jobs after Vermont’s eliminated sheltered workshops and Section 14(c) wages. It took a while to get a coherent answer. Finally, Monica Hutt, the Commissioner at the Vermont Department of Disabilities, Aging, and Independent Living told us:

I think maybe the piece that we didn’t articulate because it’s really obvious to us ... [W]e didn’t close the sheltered workshops and ... everybody that was working in the sheltered workshop went to work in the community. That would be an impossibility. ... But people’s hours were still filled. They were not just left

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<sup>5</sup> I am baffled by Commissioner Kladney’s assertion that some of the providers “run very profitable businesses” and that “the foundation of much of that profit is the lower labor costs.” **Businesses that hire Down syndrome workers tend to do so because they are trying to be good citizens, not because this will save them a bundle of money.** Kladney seems to be suggesting that MVLE is rolling in cash because it had gross revenues of \$14 million in 2017. This, of course, is not profit. It is gross receipts; it includes money that goes straight into the pockets of Down Syndrome workers in Section 14(c) programs. MVLE is a nonprofit.

At our November 15, 2019 hearing, Congressman Glenn Grothman testified to his high regard for the people in his district who work with and provide jobs for the severely disabled under Section 14(c) programs:

The people who work there, if you get to know them, are saints. As I understand it, before I [arrived at this briefing] some people were denigrating them a little bit. People who spend their life working with handicapped, working with people who are non-verbal, working with people who have to be toileted, are saints. They’re not doing it to make money; they are not doing it to take advantage of people ....

Tr. at 269.

I was very surprised when our Chair declared that she “took exception” to Grothman’s use of the word “saint” in this context. That’s when I knew the Commission was likely to produce the kind of short-sighted report that it has now produced.

If anyone thinks that hiring Down syndrome employees under Section 14(c) is a good way to get rich, I would challenge them to hire a number of Down syndrome workers and let me know how things turn out.

Apart from repealing the Section 14(c) program altogether, I can think of no better way to cause jobs for Down syndrome workers to dry up than to denigrate the employers who hire them under that program. They say no good deed goes unpunished. I used to think that was just a joke. Maybe I was naïve.



abandoned because there wasn't some minimum wage to keep them busy at an employment somewhere.

Transcript at 135.

She's right, of course. It was obvious this was going to happen. Once the option of a sheltered workshop at a subminimum wage was taken away, disabled individuals were going to lose jobs in Vermont. At the time we spoke with Ms. Hutt, the United States was enjoying unusually low unemployment rates, so optimism may have been running unusually high, even though we all know that good times never last forever. What struck me as inappropriate throughout this investigation is how hard people try to avoid saying so plainly: *Eliminating Section 14(c) programs will cause disabled individuals to lose their jobs.* Ms. Hutt put it differently--that some previously employed disabled individuals "decided that they were going to retire or arrange other services"—but the point was nevertheless made plain by the time the roundtable adjourned.

Why is it okay to take away a job that a person with Down syndrome wanted and instead put him in daycare? Such a move will take money out of that person's pocket and create the need for a larger, taxpayer-subsidized daycare/rehabilitation bureaucracy. Alas, I fear that, for some, the bureaucracy's expansion is not a bug but a feature. Bureaucracies have a tendency to expand; one effective way to do that is to edge out one's competition (in this case the Section 14(c) job market).<sup>6</sup>

I gather that for others the issue may be dressed up in the language of morality, but it is basically aesthetic. They don't like the *look* of Down syndrome adults performing menial tasks in return

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<sup>6</sup> Part of Commissioner Kladney's Statement is devoted to suggesting that the problem with the 14(c) program is that there isn't sufficient oversight. He calls it the "wild west." Commissioner Kladney needn't worry. As MVLE's Senior Director of Program Services Michelle Lotrecchiano pointed out during our March meeting, "We are heavily regulated in this industry as I'm sure you all know." Tr. at 16.

She was being accurate. As James Clark, MVLE's Quality Manager, told us, "the Department of Labor oversees everything we do. An organization has to be ready at all times to get that drop-in inspection from DOL." Tr. at 40. In addition, every two years MVLE must re-apply for 14(c) certification. To be re-certified, the Department of Labor "look[s] whether you're using the correct techniques for measuring, time-measuring workers, whether your time studies are being completed on time, which is a requisite of every six months." Tr. at 40. According to Mr. Clark, "they're pretty serious audits."

But that is just the beginning. Twice a year MVLE must also do a report to the Commonwealth of Virginia's Department of Behavioral Health and Developmental Services to maintain its license. And in order to qualify for its contracts with state authorities, it must keep up its accreditation with the Commission on the Accreditation of Rehabilitation Services (CARF). That entails submitting to a thorough inspection from a team of experts every few years. MVLE is also an approved vendor of the federal government's Ability One program, an authorized vendor for the Virginia Department of Rehabilitative Services and for the Virginia Department of Medical Assistance Services. It is also a recipient of United Way funding. **Put only slightly differently, there is always someone looking over MVLE's shoulder.** The Commission is just one among many government agencies MVLE must deal with.

for a wage that is below what any nondisabled individual would be permitted to work for. It makes them feel uncomfortable.

Generations ago it was more common for people to feel uncomfortable around the severely disabled. They wanted to keep disabled persons out of sight, because ... well ... disabled persons offended their sense of aesthetics. Today those who want to abolish sheltered workshops and Section 14(c) believe themselves to be a universe apart from those earlier generations. But they are the same. In both cases, it is all a matter of appearances ... of what looks good. What is actually in the best interests of the disabled individuals doesn't enter their minds.

I concur with Commissioner Kirsanow that the Commission shouldn't be judging issues based on appearances. We're supposed to do better than that.

## **Dissenting Statement of Commissioner Peter N. Kirsanow (Commissioner Heriot Concurring)**

### *Introduction*

During my tenure on the Commission, there have been many reports with which I disagreed. In fact, it is difficult to think of a report issued by this Commission in the past eight years with which I agreed. This report stands out because it threatens to make the world worse for those least able to fend for themselves.

The report and its findings and recommendations take the tone throughout that although some people have not yet caught up with the caravan of progress and realized that competitive integrated employment is the wave of the future, the evidence favors the superiority of this approach. This is wrong.

On the one hand, the Commission has identified one qualified success in Vermont and a handful of testimonies from high-functioning people with disabilities opposing 14(c). On the other hand, the Commission has evidence indicating that people with disabilities are more likely to be employed full-time and have better wages in states with 14(c), and thousands of public comments from parents, friends, guardians, and people with disabilities urging the retention of 14(c).

The report misleads the unwary reader into thinking that it received thousands of comments in support of 14(c) and in opposition to 14(c). For example:

Moreover, reviewing thousands of public comments received—both in favor of and against 14(c)—along with expert testimony, academic medical research, as well as persons interviewed during site visits also showed that persons with disabilities benefited greatly from being in community employment settings and not being isolated.<sup>1</sup>

The Commission heard from proponents and opponents of the program and reviewed story after story of people with a disability or disabilities who were once presumed to be only capable of working for subminimum wages in a sheltered environment, who transitioned to and excelled in competitive integrated employment. The Commission also heard and received thousands of comments, mainly from impacted parents, stating that 14(c) is needed to protect employment opportunities for people with disabilities.<sup>2</sup>

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<sup>1</sup> Report at n. 15.

<sup>2</sup> Report at p. 8 (n. 25).

The Commission received far more public comments from parents of individuals who tried working in mainstream environments and did not thrive there.<sup>3</sup> The “story after story” consists almost exclusively of a few people who testified at the Commission’s public hearing, a tiny smattering of parents whose children transitioned away from a sheltered workshop, and some people in Vermont, most of whom never worked in a sheltered workshop. It is not until page 99 that the report divulges that **98 percent of the public comments submitted to the Commission support the continuation of 14(c).**<sup>4</sup>

The Commission approvingly quotes Congressman Bobby Scott, who testified:

[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.<sup>5</sup>

In adopting Congressman Scott’s well-intentioned and optimistic view, the Commission ignores the hundreds of public comments from parents whose children cannot make the minimum wage, even with support.

The report also approvingly quotes Neil Romano, chairman of the National Council on Disabilities, who testified:

The belief that someone would choose to make less money for their work is, in and of itself, a demonstration of how certificate holders do not believe that people with disabilities are whole people capable of making even the most basic decisions beneficial to themselves.<sup>6</sup>

Mr. Romano misstates the issue and unfairly casts aspersions on 14(c) certificate holders. First, in many cases the person is not choosing between making a special minimum wage and making minimum wage. The person is choosing between making a special minimum wage and making no

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<sup>3</sup> See, e.g., Public Comment 306 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights (“[My son] has tried traditional workplaces, but his disability prevents him from succeeding in those environments.”); Public Comment 313 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights (“As we have experienced working in a community based job, [our daughter] was not included socially as a peer with co-workers.”); Public Comment 550 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights (“[My son] tried numerous competitive jobs but his work speed, work skill, or problem-solving ability was not satisfactory for these jobs, and he was let go due to unsatisfactory performance. The was discouraging and demoralizing.”); Public Comment 433 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights (Son worked in a local grocery store one summer and for Monsanto another summer, but despite best efforts of job coach to teach “soft skills,” was unable to obtain competitive employment).

<sup>4</sup> Report at p. 99 (n. 552).

<sup>5</sup> Report at n. 26.

<sup>6</sup> Report at n. 727.

wage at all. Second, Mr. Romano asserts that, “certificate holders do not believe that people with disabilities are . . . capable of making even the most basic decisions beneficial to themselves.”

Well, in at least some of these cases, the people with disabilities at issue are, as a matter of law (and also as a matter of fact) unable to make basic decisions. This is why their parents or siblings are their legal guardians **after** they have reached the age of majority. And those guardians believe that this is the best decision for their loved one. As one guardian wrote to the Commission:

If she [the ward] ever said [she wants to leave the workshop], I would let Vocational Rehabilitation try to find her a job because that would be her choice. However, it would have to be an informed choice. She does not understand the consequences of some choices. That is why she has a guardian in the first place.<sup>7</sup>

A mother wrote:

There are people who think they know what is best for my son. They are wrong. He doesn't understand, beyond a four year old, the concept of money or bills. Yes, we have focused on token economies and having him purchase things, as part of his education for 18 years. . . .

I sat in a court of law, and testified that my son was incompetent. I cried when the judge asked me if I would be comfortable with him never voting, or driving, or getting married and having a family. That day almost broke me.<sup>8</sup>

Mr. Romano implies that 14(c) employers have a low opinion of their employees, but he appears to exhibit a low opinion of the dedicated family members and guardians who care for people with disabilities. Yes, sometimes people cannot make decisions for themselves. That is why other people who care for them make decisions for them.

Congressman Scott and our fellow Commissioners are well-intentioned. But we do not love these disabled people more than their parents, siblings, uncles and aunts do. We do not know the abilities and limitations of these disabled people as well as their family members do. In fact, **we do not know these people at all**. If it were possible for a person working for subminimum wage to earn the full minimum wage “with a little support,” don't you think these devoted parents would have leapt at the opportunity? The truth is that these individuals are only able to make even the special minimum wage with a *lot* of support, not just a little support.

The report states:

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<sup>7</sup> Public Comment 458 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>8</sup> Public Comment 154 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

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.” Census data also shows lower employment rates among this group, compared with people without intellectual and developmental disabilities. 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. 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.<sup>9</sup>

Mathis asserts that anyone can succeed in community employment with the right supports, but she never gives concrete examples of how this works for severely disabled people. Concerned parents and siblings who wrote to the Commission, on the other hand, explained why competitive integrated employment is a poor fit for their loved ones. These are just a few of the comments that were submitted to the Commission and that were ignored by the report.

My sister, [AR], is 35 and has been a Lafayette Industries employee for the past 13 years. We tried competitive employment out of High School, and this is always an option for her. However, she was lost there, and it wasn’t an environment for her to succeed.<sup>10</sup>

One mother wrote about her son:

Every year at [S’s] ISP meeting, the option of training for competitive employment is discussed. All members in the room (me, [S’s] supports coordinator, and his managers) agree without question that [S] is not suited for competitive employment for the following reasons:

- Does not work at a fast pace,
- Requires monitoring,
- Sometimes has temper tantrums in the middle of the work day,
- Would not be able to defend himself if exposed to any form of abuse,
- Has no sense of stranger danger so he could easily put himself in harm’s way without realizing,

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<sup>9</sup> Report at n. 226-228.

<sup>10</sup> Public Comment 150 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

- Will take money and food from others (and from stores) if given the opportunity.<sup>11</sup>

One father, who is a pediatrician in addition to serving on the board of a 14(c) organization, wrote about his daughter:

[M]y wife and I investigated options for [S] after high school, and we looked at a number of organizations that provide services. In her last 2 years of high school, she worked at a Tucson public library, assisted by a school job coach. [S] knows the order of the alphabet and numbers quite well, so re-shelving books seemed like reasonable work for her. After she had been there several months, we met with the librarian, who made no bones about not considering hiring [S] because her productivity was not what would be needed to keep a job there. The personnel there did not interact much with [S].<sup>12</sup>

A mother wrote:

[T]he government keeps trying to send [my daughter with Down Syndrome] into the community for either work or for socializing, she does not want to leave her job at APS. Frankly, moving her for work purposes would be inappropriate, frightening and a waste of time, from both [S's] perspective and mine. [S] needs constant oversight or she becomes confused. She needs structure. APS provides work she can do, given her disability, and the support she needs to get the job done.<sup>13</sup>

A mother commented:

I am writing to ask that you do not eliminate 14c which would close sheltered workshops. Sheltered workshops are vital to developmentally disabled adults who are not high functioning enough to be mainstreamed into the "normal" workforce and are too high functioning for Adult Day Care. My sister is autistic with 24/7 oversight because she cannot understand any abstract concept such as money, danger, or modesty. She is also non-verbal. She is not able to work at a "mainstream" job. NO employer would hire her. Regular employment does not offer protective oversight – a sheltered workshop does. Some days my sister is extremely productive and other days she is hardly productive at all. Mainstream employers would not tolerate that but her sheltered workshop does. They work with her because they understand her up and down days, and know that her up days are far more than her down days. While a sheltered workshop needs their employees to be productive, they understand that each employee's level of production is going to be different, and that

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<sup>11</sup> Public Comment 166 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>12</sup> Public Comment 1,251 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>13</sup> Public Comment 229 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

most will never be able to complete a task at the level of productivity a person without the developmental disability can.<sup>14</sup>

Another mother wrote to us:

I am a parent of an adult with Down Syndrome. [My daughter] is 37 years old and has worked at Essex Industries in Mineville, NY, which was considered a sheltered workshop, for nearly 20 years. She has also received services for supported employment, but these jobs seldom last – either for the lack of work and transportation or due to her inability to maintain productivity.

Our area in the north country of NYS has limited opportunities for people with challenges. During this COVID shut down, [my daughter] has had limited contact with friends and has missed her work at Essex Industries.<sup>15</sup>

### *Legal Considerations*

The report claims that Section 14(c) may violate the Equal Protection Clause of the 14<sup>th</sup> Amendment. This can quickly be disposed of. 14(c) does not treat people with disabilities more harshly than people without disabilities. If a person without a disability is not productive enough to warrant the minimum wage (let us imagine a teenager who does not have the skill of his older coworkers), they aren't paid commensurate with their productivity. They are fired. 14(c) is an accommodation for people with disabilities. Instead of being fired, they are paid commensurate with their productivity.

In regard to Section 14(c) possibly violating the ADA, it is a well-established canon of statutory construction that Congress is presumed not to abrogate an existing law unless it does so explicitly. The ADA does not explicitly abrogate 14(c). If one needed any further evidence of this, simply look to the fact that bills have been introduced to abrogate 14(c).

The report's invocation of *Lane v. Brown* is also inapposite. As the Commission is well aware, that litigation occurred under the Obama Administration, when a guidance was in effect that extended the ADA's reach to define "segregation" as "congregate settings populated exclusively or primarily with individuals with disabilities;" "congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living;" or "settings that provide for daytime activities primarily with other individuals

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<sup>14</sup> Public Comment 267 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>15</sup> Email from mother of disabled individual to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, July 16, 2020.



with disabilities.”<sup>16</sup> This guidance went beyond the text of the ADA and the applicable regulations. The definitions above included not a single citation to the relevant regulations – because this was, once again, a regulation masquerading as a guidance.

This guidance, like many others that exceeded the statutory authority of DOJ, was rightfully withdrawn by then-Attorney General Jeff Sessions. The first draft of the Commission’s report continued to cite the withdrawn guidance as though it were still authoritative, although grudgingly admitting it had been withdrawn. The final draft of the report backed away from that, and instead cites the *Lane v. Brown* settlement as if it establishes standards that should be adopted by other states. No. The efforts to extend the ADA that were at work in the *Lane v. Brown* settlement have been rightfully withdrawn. The settlement in that case is only binding upon the parties, and other states should not consider it a guide to what course they should follow.

### *Conflation of Physical and Intellectual Disabilities*

The report suffers from often conflating physical and intellectual disabilities. This is also a problem with some of the witness testimony and public comments.<sup>17</sup>

For example, the report approvingly quotes Derek Manners, who spoke during the public comment period at the briefing:

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.<sup>18</sup>

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<sup>16</sup> Statement of the Dep’t of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, U.S. Dep’t of Justice, June 22, 2011, [https://www.ada.gov/olmstead/q&a\\_olmstead.htm](https://www.ada.gov/olmstead/q&a_olmstead.htm).

<sup>17</sup> See 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; see also Derek Manners Testimony, *Subminimum Wages Briefing*, pp. 354-55.

<sup>18</sup> Report at n. 256.

Here's the thing: *Mr. Manners left the sheltered workshop!* He has excelled in his profession. If you want to leave the sheltered workshop, *there is nothing stopping you from doing so.* The same is true of Mr. Anton, an individual with Down Syndrome who testified that the work at the sheltered workshop was monotonous and did not challenge him. The people who have the capability to flourish outside the workshop can do so, and have done so. But many people who work in the workshops have tried outside employment, and it has not been a good fit, or their behavioral challenges mean that outside employment will never be a good fit.

One brother wrote:

My sister has had a learning disability with autism all her life. . . . She had several jobs in the general community that DVR helped her obtain. These were jobs that basically no one else wanted. Jobs like cleaning public restrooms, cleaning restrooms in bars, taking out garbage in restaurants. There were other jobs that were less demeaning but because of her autism she was not able to always meet the expectations made of her. She was abused by employers. She had no self-worth. She became so depressed by all the expectations being made of her that she threatened suicide. It was a life of failure after failure! No friends.<sup>19</sup>

A mother wrote:

My son has worked in a workshop for many years. Before that, he tried numerous competitive jobs but his work speed, work skill, or problem-solving ability was not satisfactory for these jobs, and he was let go due to unsatisfactory performance. This was discouraging and demoralizing.<sup>20</sup>

Another mother wrote:

My adult daughter, [G], has cognitive impairments. When she completed our special school district's program at age 21, we sought employment for her. She worked in the private sector for about 1.5 years. We struggled to find consistent full-time employment in a place that had the supervision she needed.<sup>21</sup>

The pediatrician father quoted earlier wrote:

[S] cannot be left alone. Although she has remarkable gifts such as an uncanny memory for dates and times, try as we might, she has not learned to look both ways before crossing the street. She travels with my wife and me pretty much everywhere we go.<sup>22</sup>

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<sup>19</sup> Public Comment 1,176 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>20</sup> Public Comment 550 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>21</sup> Public Comment 666 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>22</sup> Public Comment 1,251 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

The report also approvingly quotes Dr. Julie Christensen, who wrote:

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% 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%, 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.<sup>23</sup>

The report also states, “Census data also show that very generally speaking, persons with intellectual or developmental disabilities may have the hardest time finding employment. 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.”<sup>24</sup> The Commission’s Finding No. 3 also states:

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. [emphasis added]<sup>25</sup>

**The Commission adduced no evidence supporting this assertion.** In order to say that people earning 14(c) wages are not categorically different from people employed in integrated jobs, the Commission would have needed to conduct a far more in-depth study. The Commission would have needed to study the two populations in-depth. For example, in order to support this assertion, the Commission would have needed to have found representative samples of people with intellectual disabilities who are working in 14(c) employment and people with intellectual disabilities who are working in competitive integrated employment. The Commission then would have needed to study the level of the intellectual disabilities in both groups to ensure that both the average and median IQs of the two groups are comparable. The Commission then would have needed to study whether behavioral difficulties are comparable across the two groups.

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<sup>23</sup> Report at n. 259

<sup>24</sup> Report at 450-451.

<sup>25</sup> Commission Finding No. 3.

The Commission did none of this.

The finding's assertion that people earning subminimum wages are not categorically different in level of disability than people working in mainstream jobs has no basis in the Commission's research. Certainly, *some* people with intellectual or developmental disabilities are capable of competitive integrated employment. But as evidenced by the many public comments we received, some people with intellectual or developmental disabilities are *not* capable of competitive integrated employment, and would be incapable no matter how many supports they received.

The report also cites a statement from a National Council on Disability report. "Research indicates that employees receiving supported employment services generate lower cumulative costs than employees receiving sheltered workshop services and that, whereas the cost-trend of supported employees shifts downward over time, the opposite is the case for people receiving sheltered workshop services."<sup>26</sup> The report on which the NCD report relies compared people who had received services from sheltered workshops before entering competitive integrated employment to people who had not received services from sheltered workshops before entering competitive integrated employment.<sup>27</sup>

It is entirely possible that people who are referred to sheltered workshops before entering competitive employment become dependent on supports provided at the sheltered workshop. On the other hand, it is also possible that there is an unobserved variable that is responsible for people who started in sheltered workshops needing more services over time. Although the study attempted to match people in the two groups based on their characteristics, they could not match people based on the severity of their cognitive disability. As the author notes, this alone could account for the study's findings.<sup>28</sup> That is to say, people employed by sheltered workshops may in the aggregate have had more serious cognitive challenges than those who were never employed by sheltered workshops, and that may explain why the former make somewhat less per hour and require more services than the latter.

The study found that people who had not been employed in sheltered workshops were more likely to have been referred to vocational rehabilitation by their secondary schools than were people who were first employed in sheltered workshops.<sup>29</sup> The study's author believes this is evidence that vocational rehabilitation is the best way for people with disabilities to eventually find competitive integrated employment. On the other hand, it is possible that the people who were not referred to

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<sup>26</sup> Report at n. 536.

<sup>27</sup> Robert Evert Cimera, Does being in sheltered workshops improve the employment outcomes of supported employees with intellectual disabilities?, 35 J. of Vocational Rehabilitation 21 (2011).

<sup>28</sup> Robert Evert Cimera, Does being in sheltered workshops improve the employment outcomes of supported employees with intellectual disabilities?, 35 J. of Vocational Rehabilitation 21, 25 (2011).

<sup>29</sup> Robert Evert Cimera, Does being in sheltered workshops improve the employment outcomes of supported employees with intellectual disabilities?, 35 J. of Vocational Rehabilitation 21, 25 (2011).

vocational rehabilitation had more severe disabilities, and their high school counselors thought vocational rehabilitation was not the right fit. Because the people studied were (understandably) not matched by high school nor severity of intellectual disability, it's impossible to say.

On the other hand, the Commission received numerous public comments explaining in detail why particular disabled individuals are unable to be sufficiently productive to make minimum wage. Ernest M. Dodge, who is the President/CEO of JM Murray in Cortland, New York, which, although a non-profit, operates as a business.<sup>30</sup> Among other services, JM Murray fulfills contracts for “injection molding, liquid filling, assembly, product imaging, packaging, and distribution.”<sup>31</sup> JM Murray employs over 240 people, 110 of whom are people with disabilities.<sup>32</sup> Most of the individuals with disabilities who work at JM Murray work under a 14(c) certificate, but some are as productive as workers without disabilities and are paid accordingly.<sup>33</sup> Mr. Dodge also writes that the prevailing pay rate at JM Murray is not the federal minimum wage, but is \$12.67 per hour, based on the wages its local for-profit competitors pay. Mr. Dodge writes:

The majority of individuals working under our 14(c) certificate were born with developmental disabilities. No matter how hard they try or how much assistance we can provide through training and adaptive work spaces and accommodations they were born with disadvantages they simply cannot overcome. Life is not fair. Time and experience on the job does not equate to greater productivity. What they do have that cannot be taken away is a desire to work and the dignity and pride of EARNING a paycheck that is threatened by the discussion to eliminate the CHOICE presented them. Of the over 100 individuals less than 7 work at efficiencies exceeding 50%. The majority of them work at less than 30%. What employer has the ability to fully compensate their employees for less than 30% efficiency?<sup>34</sup>

A father and mother wrote to me and said:

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<sup>30</sup> Public Comment 522 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

JM Murray was recognized in December of 2017 by New York state as one of the first approved community based integrated employers in the state as part of the Office of People with Developmental Disabilities Transformation Plan initiative. We add the word “competitive” when we describe ourselves because we do not rely on state preferred source contracts and we have no federal work. The majority of our work is derived from providing competitive pricing, expected on time shipments and meeting or exceeding quality standards that are demanded from our private for-profit customers. We don't shuffle papers or “make work”. Our work component comprises almost \$9 million dollars of our almost \$21 million dollar budget and we employ over 240 people. Further separating us from most not-for profits is our annual fundraising is less than \$10,000. We operate as a business.

<sup>31</sup> *Contract Manufacturing*, JM Murray, <https://www.jmmurray.com/business-division/contract-manufacturing/>.

<sup>32</sup> Public Comment 522 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>33</sup> *Id.*

<sup>34</sup> Public Comment 522 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

Our son . . . was born with Downs Syndrome and is legally blind. While he is able to perform some simple routine tasks like clearing the supper table and personal care responsibilities with good consistency, he has difficulty with tasks that involve reasonable vision and understanding of technique, such as rinsing dirty dishes and loading them in the dishwasher – for which he requires supervision to ensure the dishes are properly rinsed and positioned. There is no cure for Downs Syndrome, and [our son’s] eyesight has worsened considerably, resulting in him being declared legally blind.

[Our son] entered a disabled job program just after he turned twenty and subsequently obtained a job as a bagger in a grocery store. While everyone enjoyed him for his affable personality and ability to perform his work duties, [he] was easily distracted and could not grasp the concept of limited break times, even with on-site coaching. He was subsequently let go after a few months employment. The disabled job program staff were unable to offer opportunities for his employment.

...

[Our son] has been evaluated by many experts who concur that his Downs Syndrome and limited vision make it impossible for him to hold a minimum wage paying job. [Our son] understands that. But, it does not matter, because he has a job at a workplace where he is considered an equal by his fellow employees and is often praised for his work.<sup>35</sup>

Dr. Christensen is the head of APSE, an organization dedicated to promoting competitive integrated employment for people with disabilities. Based on its website, APSE primarily engages in lobbying, though the website does include a list of resources available to disabled people.<sup>36</sup> It does not appear that APSE itself engages in large-scale training of people with disabilities, though Dr. Christensen may have done this at other times in her life. There is nothing wrong with APSE being a lobbying organization, but there is no reason to privilege APSE’s view that every person with a disability is capable of competitive integrated employment over that of parents and employers who deal with real people with disabilities every day. This is nothing something that is theoretical to them. Maybe the people Dr. Christensen works with can be 100% productive with the right supports, but it seems far-fetched to think that everyone can.

Dr. Christensen also states that people currently employed at 14(c) facilities will be harmed unless the federal government pays more for their products and services. She writes:

Federal contracts largely drive the 14(c) economy, and these contracts are awarded and funded based on an assumption of low labor costs. Were 14(c) to be eliminated without a

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<sup>35</sup> Email from parents of disabled individual to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, July 3, 2020.

<sup>36</sup> *APSE Mission, Vision & Values*, APSE, <https://apse.org/about/mission-vision/>.

simultaneous increased investment on the part of the Federal government for the products and services currently received under 14(c), there is a real possibility of doing harm. If the contracts cannot support the payment of the Federal minimum wage, people will likely lose their jobs and the system will collapse.<sup>37</sup>

If people working under 14(c) certificates were just as productive as people who don't work under 14(c) certificates, why would the system collapse? Under 14(c), employers must engage in time trials to determine an employee's level of productivity and base the employee's wage on that. If these employees are just as productive as non-disabled workers, there should be two options: 1) They are fully as productive, and therefore their wages are already close to or at the federal minimum wage, and therefore the contracts should have already taken that into account during the bidding process; 2) If they are fully as productive and they are not working at 100% capacity due to low expectations on the part of management, they can get additional contracts so they will work at 100% capacity. It is only if the employees are truly not as productive as non-disabled employees in the same position that disaster looms, because in that case, these firms will not be competitive if they are required to pay minimum wage.

In many cases, an accommodation can be made for a physical disability, particularly given technological advances. Some accommodations can also be made that assist individuals with intellectual disabilities. However, some individuals with intellectual disabilities, as a consequence of their disability, have behavioral problems that cannot be solved with adaptive technology.

Our grandson, who has both autism and intellectual disability, has been working in a 14c sheltered workshop since finishing high school. He is a highly motivated and diligent worker. He takes pride in being able to work every day and earn a paycheck. He chose his workshop, because he wanted to work and earn money, but due to his disability, he cannot work in the community. His disability causes behavioral complications and anxiety that are incompatible with community employment. Additionally, he works at a pace that is quite slow and lacks the communication skills that are necessary for a typical job.<sup>38</sup>

A mother wrote:

Some disability advocates are telling lawmakers that all people, no matter how disabled, can find integrated, competitive employment.

This simply is not true.

We are working hard with [B's] school to decrease his behavior issues (such as impulsively taking food from someone's plate or loud yelling) and increase his vocational skills (such

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<sup>37</sup> Christensen Statement at 6.

<sup>38</sup> Public Comment 563 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

as folding t-shirts, sorting silverware and shredding paper). [B] cannot read, write, or talk. . . .

We have been working on IEP goals for years to get [B] ready for the real world when he turns 21. In doing so, I have learned about the post-21 REAL world of employment for the disabled. Who is going to hire [B] especially when a nondisabled or more high functioning disabled person is available who can do 20x the work?

Unfortunately, if we are all being honest, the answer is no one. No one is going to hire [B].<sup>39</sup>

A sister wrote:

[D] is the most loving person you will ever meet. He is also the most trusting person on earth. He sees total strangers as friends, someone he would want to shake hands with and strike up a conversation. He would do anything anyone asked of him. [D] has severe cognitive impairments, but is willing to do anything he is capable of. He has very limited speech and his cognitive delay also causes his understanding of what a person may mean to be limited and possibly misunderstood.<sup>40</sup>

The report has completely lost touch with reality by the time it approvingly quotes panelist Finn Gardiner:

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 dollar.<sup>41</sup>

Let's break that down: "a worker with a disability, who is deemed to be somehow less productive than other members of society". Does Mr. Gardiner, and the Commission, reject the objective fact that some people are more productive than others? This is the sort of thing that can literally be measured, and in order to pay subminimum wage, it *is* measured. If an average worker without a disability can pack sixty widgets in a box in an hour, and a particular person with a disability can only pack thirty widgets in a box in an hour, the person with a disability is objectively less productive.

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<sup>39</sup> Public Comment 403 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>40</sup> Public Comment 484 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>41</sup> Report at n. 257.



Our colleagues seem to conflate “productive” with “worth”. Just because someone can only pack thirty widgets in an hour does not mean he has less intrinsic worth than someone who can pack sixty widgets in an hour.

The report does quote people who support the continuation of 14(c). It then waves away their concerns without engaging the issues. Congressman Grothman, Congressman Sensenbrenner, and Kate McSweeney testified to the importance of 14(c) in providing an opportunity for people with disabilities to work and receive a paycheck.<sup>42</sup> The report replies triumphantly that the National Council on Disability says that 14(c) workplaces couldn't survive unless they paid subminimum wage<sup>43</sup>, and that former Governor Tom Ridge says there will still be Community Rehabilitation Programs to provide respite for caregivers.<sup>44</sup>

*That is exactly the problem!* Many people with disabilities who work under a 14(c) certificate are not productive enough to earn minimum wage. If you have to hire twice as many people to make widgets as your competitor, and you have to pay your workers the same wage, *of course* your business is going to fail. And Community Rehabilitation Programs without work is exactly what so many parents wrote and told the Commission is not a good option for their children – glorified babysitting, day after day.

The report also assumes that no one has ever thought of this great idea of “supports” before, and no one who works under a 14(c) certificate ever tried to find a mainstream job. Again, we received many comments from people whose loved ones tried mainstream employment before settling on a 14(c) job. “[My son] tried numerous competitive jobs but his work speed, work skill, or problem-solving ability was not satisfactory for these jobs, and he was let go due to unsatisfactory performance. This was discouraging and demoralizing.”<sup>45</sup> Dr. Christensen stated in her testimony that people of all abilities are often let go from jobs when it is not working out, and we just look

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<sup>42</sup> Report at n. 356-361.

<sup>43</sup> Report at n. 366. 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).

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 sub-minimum wages. Or, plainly stated, subminimum wage is not a bug of the workshop model, it is its primary feature.

<sup>44</sup> Report at n. 371.

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.

<sup>45</sup> Public Comment 550 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

for a better fit.<sup>46</sup> But some people with disabilities have tried multiple mainstream jobs, and it turned out that a sheltered workshop was a better fit for them.

The report quotes Brian Collins from Microsoft, who says that Microsoft has successfully integrated disabled employees without resorting to 14(c) wages.<sup>47</sup> As James White, who is a Business Coordinator at Maryhaven Center of Hope, a 14(c) employer, pointed out in an email to me, the ADA only requires that employers make reasonable accommodations for *qualified* individuals.<sup>48</sup> Mr. White notes that the EEOC's guidelines for "reasonable accommodations" states:

An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation, is not a "qualified" individual with a disability within the meaning of the ADA. Nor is an employer required to lower production standards – whether qualitative or quantitative – that are applied uniformly to employees with and without disabilities.<sup>49</sup>

Mr. White notes in his email, "If a person's disability doesn't allow him or her to meet industry defined productivity standards, "with or without" reasonable accommodations[] then that person is not QUALIFIED for the job and will not be hired. . . . Therefore, those with the most significant disabilities need 14 c to provide an employment option not provided by the ADA."<sup>50</sup> Responding to Mr. Collins's testimony about Microsoft's success employing people with disabilities, Mr. White writes, "There are corporate success stories such as Microsoft, which presented at the briefing. These initiatives are to be celebrated and congratulated. But these programs are again limited to qualified individuals, who may require reasonable accommodations, but meet essential job functions."<sup>51</sup>

### *Eliminating 14(c) Will Cost Some Disabled Employees Their Jobs*

The current federal minimum wage is \$7.25 an hour.<sup>52</sup> The federal minimum wage is not the real minimum wage. The *real* minimum wage is zero.

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<sup>46</sup> Christensen Statement at 4-5.

<sup>47</sup> Report at n. 389.

<sup>48</sup> Email from James White to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, June 29, 2020.

<sup>49</sup> *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, Equal Employment Opportunity Commission, Oct. 17, 2002, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#general>.

<sup>50</sup> Email from James White to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, June 29, 2020.

<sup>51</sup> Email from James White to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, June 29, 2020.

<sup>52</sup> *Minimum Wage*, U.S. Department of Labor, <https://www.dol.gov/general/topic/wages/minimumwage>.

Why is the real minimum wage zero? Well, an employee must be sufficiently productive to justify the payment of whatever wages she earns. The employer needs to make a profit in order to stay in business, and that is impossible if labor costs are so high that the employer can't sell his products or services at a competitive price. To put it in simple terms, assume an employer can sell 50 widgets for \$10. The materials to make 50 widgets cost \$2. It takes a worker of average productivity one hour to make 50 widgets. If the worker makes minimum wage, that means the total cost to produce 50 widgets is \$9.25, which leaves the employer \$0.75 of profit.

Now imagine that the state raises the minimum wage to \$8.00 an hour. The employer now only breaks even when he sells his 50 widgets. This isn't sustainable. The employer has a few options. He can close down his business. He could move his business across the state line to a state that still has a \$7.25 minimum wage. He could invest in new machinery that eliminates the need for so many widget-makers (fast-food restaurants have begun doing similar things by replacing some workers with tablets that customers can use to order).<sup>53</sup> He could move his business to another country, such as Mexico or China. Or he could hire a more skilled widget-maker who produces 60 widgets per hour, which will allow him to make a profit.

The most likely outcomes for disabled people who are employed under the special minimum wage are either that their employer will simply close or that they will be replaced by more efficient workers (labor-labor substitution). Or, as economists put it, "If the minimum wage exceeds the value of a worker's output, a firm can potentially find a replacement worker whose productivity meets or exceeds the floor."<sup>54</sup> As a dad wrote in regard to his son who has I/DD:

That ability to pay my son a reduced rate allows you to consider hiring him for a real job at your widget factory. If Section 14(c) were to be eliminated and you were required to pay every worker \$10 per hour regardless of their ability to perform the task, from a business perspective you would not be able to consider hiring my son nor many other individuals with intellectual and developmental disabilities. (Sure you could hire one or two people with I/DD out of a sense of social responsibility, but those would be token employees. You can imagine how that would feel.)<sup>55</sup>

Recent initiatives in major cities to raise the minimum wage to \$15 an hour give us an idea of what would happen to disabled employees who are currently working under 14(c) certificates if 14(c)

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<sup>53</sup> Rachel Greszler, *Would a \$15 Minimum Wage Help or Hurt Low Income Workers?*, The Heritage Foundation, Sept. 16, 2019, <https://www.heritage.org/monetary-policy/commentary/would-15-minimum-wage-help-or-hurt-low-income-workers>.

<sup>54</sup> Jeffrey Clemens, Lisa B. Kahn, Jonathan Meer, *Dropouts Need Not Apply? The Minimum Wage and Skill Upgrading*, NBER Working Paper 27090, May 2020, <https://www.nber.org/papers/w27090>.

<sup>55</sup> Public Comment 708 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

was eliminated. It is, of course, not possible to predict what will happen with absolute certainty, but we can make some informed guesses.

Why does the \$15 minimum wage debate pertain to workers with disabilities? First, if 14(c) is eliminated, workers who formerly worked under a 14(c) certificate will earn the minimum wage – if they can earn any wage at all. In some jurisdictions, the minimum wage is \$15. That means that the worker has to produce at least \$35,000 worth of value annually in order to keep a job.<sup>56</sup> That is a tall order for an employee who is only fifty percent as productive as an average worker without disabilities. It will be hard for many 14(c) employees to be productive enough to earn the federal minimum wage of \$7.25, let alone \$15.

Second, a 14(c) worker who is now expected to earn \$7.25 an hour is in a similar position as a non-disabled worker making \$7.25 who is now expected to earn \$15.00 an hour. Both employees are faced with the necessity of dramatically increasing their productivity in order to justify an increased wage.<sup>57</sup>

In a 2018 study published in *The American Economic Review*, economists Paul Beaudry, David Green, and Ben Sand predicted that Seattle’s minimum wage hike would lead to significant job loss among workers who were then making \$10 an hour or less, and would have a smaller effect on workers making between \$10 and \$15 an hour.<sup>58</sup> They predicted similar, although smaller, effects on workers in Los Angeles and San Francisco.

Other research reveals that this is indeed what happened in Seattle, with the caveat that *rather than job loss*, prospective new entrants into the job market were *never hired*. A recent study examined the effects of the first two hikes of Seattle’s minimum wage on the way to \$15/hour. The Washington State minimum wage remained flat throughout this period. The authors found:

Essentially all of the earnings increases accrue to the more experienced half of the low-wage workforce. The less experienced half saw larger proportionate decreases in hours worked, which we estimate to have fully offset their gain in wages, leaving no significant change in earnings. More experienced workers were also more likely to supplement their Seattle income by adding hours outside the city. Finally, conditional on being employed,

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<sup>56</sup> Rachel Greszler, *Would a \$15 Minimum Wage Help or Hurt Low Income Workers?*, The Heritage Foundation, Sept. 16, 2019, <https://www.heritage.org/monetary-policy/commentary/would-15-minimum-wage-help-or-hurt-low-income-workers>.

<sup>57</sup> There are some people, of course, who argue that a higher minimum wage will not lead to job loss. See Noah Smith, *A \$15 Minimum Wage Isn't So Scary*, Bloomberg, July 11, 2019, <https://www.bloomberg.com/opinion/articles/2019-07-11/-15-minimum-wage-won-t-cause-the-job-losses-predicted-in-econ-101>.

<sup>58</sup> Paul Beaudry, David A. Green, and Ben M. Sand, *In Search of Labor Demand*, 108 Am. Econ. Rev. 2714, 2753-2755, 2018 (“for workers below \$10 an hour in Seattle, the employment rate declines by over 10 percent in response to raising the minimum wage to \$15. Meanwhile, for the larger group with wages at or below \$15, the decline is under 7 percent.”), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20141374>.

both less and more experienced workers were more likely to remain employed by their baseline Seattle employer, implying an 8% reduction in labor turnover rates.

Evidence of earnings increases for workers employed at baseline appears to contrast with our earlier work suggesting that total earnings in Seattle's low-wage labor market declined after the second phase-in. Our analysis of the entry rate of new workers into Seattle's low-wage labor market reconciles the findings. As Seattle's minimum wage increased, the entry rate fell significantly behind the rate observed in outlying portions of Washington State. Overall, evidence suggests that employers responded to higher minimum wages by shifting their workforce toward more experienced workers. . . .

Seattle's minimum wage increase appears to have successfully increased the labor market income of the most experienced workers in low-wage jobs, arguably those for whom low-wage work most resembles the "dead-end" archetype. The losses in employment opportunity appear to have been concentrated among the least experienced workers, or those attempting their first entry into the labor market.<sup>59</sup>

Minimum wage hikes are most detrimental to those who are already at a disadvantage in the workforce, including the young, black men, and those with less formal education.<sup>60</sup> Minimum wage hikes also encourage employers to shift toward automation for routine jobs. Jobs that are most vulnerable to automation include manufacturing and services – both fields in which many 14(c) people are currently employed, and the fields in which they likely would seek employment if 14(c) was eliminated.<sup>61</sup> As the authors of one study wrote, "While these adoptions [of new

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<sup>59</sup> Ekaterina Jardim et al., *Minimum Wages Increases and Individual Employment Trajectories*, NBER Working Paper 25182, October 2018, at 4-5, <https://www.nber.org/papers/w25182>.

<sup>60</sup> Jeffrey Clemens, Lisa B. Kahn, Jonathan Meer, *Dropouts Need Not Apply? The Minimum Wage and Skill Upgrading*, NBER Working Paper 27090, May 2020, at 14-15, <https://www.nber.org/papers/w27090>.

We find that states with statutory increases in the minimum wage see the average age increase in these occupations . . . the age effect primarily manifests through a nearly 1 percentage point drop in the young adult employmentshare . . . .The decline in employment share for those without a high school diploma is just over half a percentage point (4 percent on a base of 17 percent), is statistically significant at the 5 percent level, and is almost exactly offset by the increase for high school and some college.

See also Martha J. Bailey, John DiNardo, and Bryan A. Stuart, *The Economic Impact of a High Minimum Wage: Evidence From the 1966 Fair Labor Standards Act*, NBER Working Paper 26926, May 2020, at 3-4, <https://www.nber.org/papers/w26926>.

<sup>61</sup> Grace Lordan and David Neumark, *People Versus Machines: The Impact of Minimum Wages on Automatable Jobs*, NBER Working Paper 23667, Jan. 2018, at 13-14, <https://www.nber.org/papers/w23667>.

technology] undoubtedly lead to increased job opportunities for some workers – for which we find some evidence – it is likely that there are workers who will be displaced that do not have the skills to do the new tasks.”<sup>62</sup> Even if the overall effect of minimum wage increases is small, it can have a marked effect on disadvantaged subgroups of the workforce. For example, the minimum wage provisions of the 1966 Fair Labor Standards Act had serious negative effects on both the employment levels and hours worked of black men, while white men were not seriously affected.<sup>63</sup> “In summary, even if aggregate employment responded little to the 1966 FLSA, the legislation engendered compositional changes in employment and impacted some of the more disadvantaged workers in the economy.”<sup>64</sup> Workers with disabilities are certainly “disadvantaged workers”. If history is any guide, minimum wage increases will have a particularly negative effect on their workforce participation and hours worked.

Anecdotally, a mother and disability advocate from Seattle wrote and shared what happened to people with disabilities in Seattle and King County, Washington, after the elimination of 14(c) in those jurisdictions.

I live in Seattle and when the elimination of certificates was passed in Seattle there were 8 people working in COMMUNITY jobs – all earning between \$9.30 and \$11.50 an hour (Seattle minimum wage was \$15.00). All but the one person who only worked 6 hours a week had their job hours reduced 20-40% due to the elimination of certificates. This meant that they had much less integration and community engagement – yes, their hourly wage increased but their overall income stayed the same or decreased.

Interesting to note that not one of those 8 people was in favor of elimination of certificates. In fact, public comments sent to the Office of Labor Standards were clearly in favor of

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In the aggregate across all industries . . . we find that minimum wage increases cause a statistically significant reallocation of labour away from automatable tasks. We find that a 10 percent increase in the minimum wage leads to a 0.31 percentage point decrease in the share of automatable jobs done by low-skilled workers, implying an elasticity of -0.10.

When we look separately by industry, the estimated effects in construction, wholesale, retail, finance, and public administration are small, centered around zero, and not statistically significant. In contrast, the effects are larger for manufacturing, transport, and services, and significant at the 5- or 10-percent level for manufacturing and transport. For example, the estimates imply that the elasticity of the share of automatable jobs among low-skilled workers in manufacturing with respect to the minimum wage is -0.18.

<sup>62</sup> Grace Lordan and David Neumark, *People Versus Machines: The Impact of Minimum Wages on Automatable Jobs*, NBER Working Paper 23667, Jan. 2018, at 25-26, <https://www.nber.org/papers/w23667>.

<sup>63</sup> Martha J. Bailey, John DiNardo, and Bryan A. Stuart, *The Economic Impact of a High National Minimum Wage: Evidence from the 1966 Fair Labor Standards Act*, NBER Working Paper No. 26926, April 2020, <https://www.nber.org/papers/w26926>.

<sup>64</sup> Martha J. Bailey, John DiNardo, and Bryan A. Stuart, *The Economic Impact of a High National Minimum Wage: Evidence from the 1966 Fair Labor Standards Act*, NBER Working Paper No. 26926, April 2020, at 3-4, <https://www.nber.org/papers/w26926>.

continuing to use special certificates. The elimination of certificates not only affected those 8 people but eliminated employment opportunities for others that had already arranged for employment. Jobs were lost. [emphasis in original]

In King County, Washington, the pre-vocational program was eliminated over the past 4 years. There were 142 people who had an average community engagement of 15 hours a week with their job or other activities at a facility/community center. As of August 2019 only 23 out of the 142 had any employment at all. Their average work week is only 8.75 hours a week. Yes, they are making minimum wage but the employment rate for this group went from 100% to 17% with fewer hours of engagement a week in employment. This was not the choice of those who had been employed.<sup>65</sup>

Although one would not know this from the report, the fact that eliminating 14(c) results in lost jobs was even admitted at the roundtable in Vermont held by the subcommittee. Monica Hutt, who is the Commissioner of Vermont's Department of Disabilities, Aging, and Independent Living said:

I think maybe the piece that we didn't articulate because it's really obvious to us and we aren't seeing it so that you all are getting the trajectory is that we didn't close the sheltered workshops and that everybody that was working in the sheltered workshop went to work in the community. That would be an impossibility. . . . But people's hours were still filled. They were not just left abandoned because there wasn't some minimum wage to keep them busy at an employment somewhere. So these community-based supports were not only about building community but about building people's skills so that they became job ready to enter competitive employment in a different way.<sup>66</sup>

***That would be an impossibility.*** That is exactly what the many parents and guardians who wrote the Commission have been saying, but the majority ignored those comments. Only 40-50 people who worked in the sheltered workshop were able to move into competitive employment.<sup>67</sup> What happened to the other people who worked in the sheltered workshop? Well, "[T]hen others decided that they were going to retire or arrange other services."<sup>68</sup> In other words, they lost their jobs.

*States with 14(c) Have Better Outcomes for People with Disabilities*

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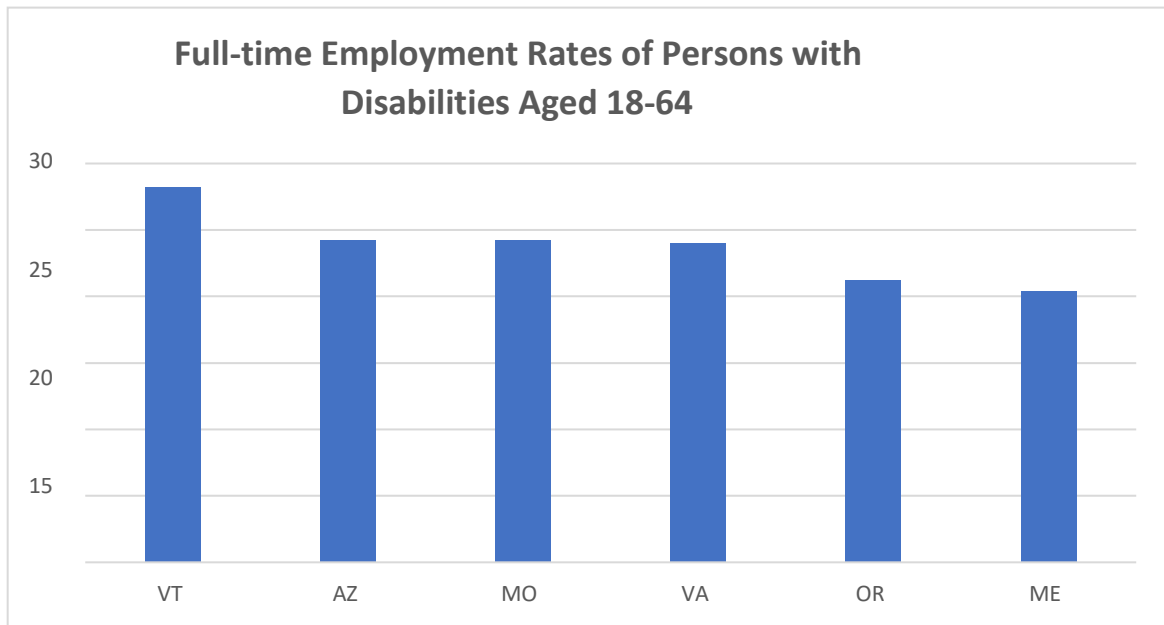
<sup>65</sup> Public Comment 334 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>66</sup> Vermont Site Visit Transcript 76, 77 (March 4, 2020).

<sup>67</sup> Vermont Site Visit Transcript 79 (March 4, 2020).

<sup>68</sup> Vermont Site Visit Transcript 79 (March 4, 2020).

The Commission’s staff studied six states – three that allow payment of subminimum wages, and three that do not allow the payment of subminimum wages or are phasing it out. Of these six states, only one state that does not permit the payment of 14(c) wages has a higher full-time employment rate for people with disabilities than the three states that permit the payment of subminimum wages. The accompanying chart, Chart 4.1, is reproduced below.



The text accompanying the chart states:

The chart above shows that at the macro level, the state that has phased out the payment of subminimum wages completely (Vermont) has the highest employment rate for people with disabilities, but the state allowing subminimum wages (Missouri) has the same rate as states that are phasing subminimum wages out (Maine and Oregon).<sup>69</sup>

No. The chart above shows that in Vermont, 28.2% of people with disabilities have full-time employment. In Arizona, Missouri, and Virginia, all of which permit the payment of 14(c) wages, 24-24.2% of people with disabilities have full-time employment. In Oregon, only 21.2 percent of people with disabilities have a full time job, and only 20.4 percent of people with disabilities in Maine have a full time job.

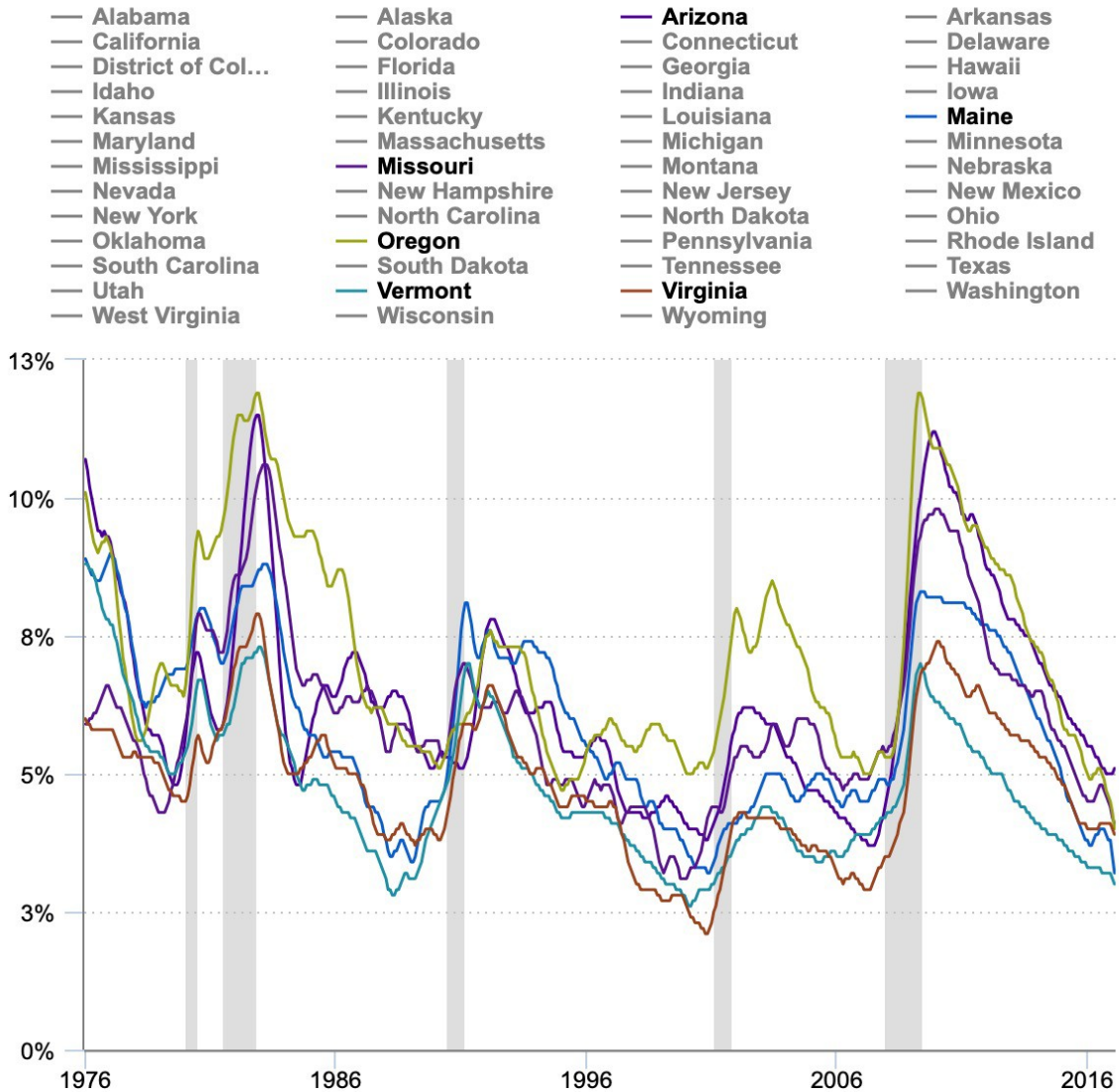
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<sup>69</sup> Report at p. 152 (n. 820).



Furthermore, Vermont usually has a lower unemployment rate than other states, as shown in the chart below.<sup>70</sup>

**Unemployment rates by state, January 1976–February 2017, seasonally adjusted**



Shaded areas represent recessions as determined by the National Bureau of Economic Research. Click legend items to change data display. Hover over chart to view data. Source: U.S. Bureau of Labor Statistics.



<sup>70</sup> *The Economics Daily: Unemployment rates in Arkansas and Oregon at record lows in February 2017*, Bureau of Labor Statistics, March 31, 2017, <https://www.bls.gov/opub/ed/2017/unemployment-rates-in-arkansas-and-oregon-at-record-lows-in-february-2017.htm>.

In 2017, Vermont's unemployment rate dropped from 3.1% to 2.7%.<sup>71</sup> Maine's unemployment rate fell from 3.6% to 3.1%.<sup>72</sup> Oregon's unemployment rate hovered around 4.1% - 4.2%.<sup>73</sup> Virginia's unemployment rate declined from 4.0% to 3.4%.<sup>74</sup> Arizona's unemployment rate fell from 5.1% to 4.7%, and Missouri's from 4.1% to 3.5%.<sup>75</sup>

In other words, in 2017, Vermont and Maine had the lowest unemployment rates of all six states, and Oregon had a lower unemployment rate than Arizona. Yet still, Arizona, Missouri, and Virginia – the three states that permit 14(c) wages — managed to have more people with disabilities in full-time work than Oregon and Maine.

A state like Vermont that has a very tight labor market is better able to find employment opportunities for people with disabilities.<sup>76</sup> When there are very few people available to hire, an employer is more willing to hire someone who works more slowly or needs additional assistance. Someone working at 70% may be better than no one working in that position at all. But when there are many people out of work – as is the case now – employers will want to hire the most efficient person for the job. In particular, given Oregon's historic sharp spikes in unemployment (see the chart above), workers with disabilities will be at a real disadvantage, especially because their rate of employment had already dropped sharply between 2016 and 2017.<sup>77</sup>

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<sup>71</sup> *Databases, Tables, & Calculators by Subject*, Bureau of Labor Statistics (data extracted July 7, 2020), <https://data.bls.gov/pdq/SurveyOutputServlet>.

<sup>72</sup> *Databases, Tables, & Calculators by Subject*, Bureau of Labor Statistics (data extracted July 7, 2020), <https://data.bls.gov/pdq/SurveyOutputServlet>.

<sup>73</sup> *Databases, Tables, & Calculators by Subject*, Bureau of Labor Statistics (data extracted July 7, 2020), <https://data.bls.gov/pdq/SurveyOutputServlet>.

<sup>74</sup> *Databases, Tables, & Calculators by Subject*, Bureau of Labor Statistics (data extracted July 7, 2020), <https://data.bls.gov/pdq/SurveyOutputServlet>.

<sup>75</sup> *Databases, Tables, & Calculators by Subject*, Bureau of Labor Statistics (data extracted July 7, 2020), <https://data.bls.gov/pdq/SurveyOutputServlet>.

<sup>76</sup> Furthermore, Vermont is also unique in that the state does not require people with disabilities to work and provides sufficient funds to support people if they do not wish to work. Most states do not have that luxury. See Transcript at 235-236.

COMMISSIONER KLADNEY: I think you said 47 percent of people have found – DR. DAGUE: Yes.

COMMISSIONER KLADNEY: - competitive integrated employment. DR. DAGUE: Right.

COMMISSIONER KLADNEY: So, that would leave 53 percent that have not, is that correct? DR. DAGUE: Yes.

COMMISSIONER KLADNEY: So, what do those folks do?

DR. DAGUE: Well, some of them are looking for work. Some are choosing not to work. We're sort of more of an Employment First state, the policy and philosophy, more than policy, so we don't require people to work, so if people choose not work, that is up to them. Others are choosing community-based services rather than employment.

<sup>77</sup> Report at Table 4.1 (n. 821) (showing that employment rates for all individuals with disabilities declined from 40.1% to 37.0%, and for individuals with cognitive disabilities from 32.5% to 29.8%).

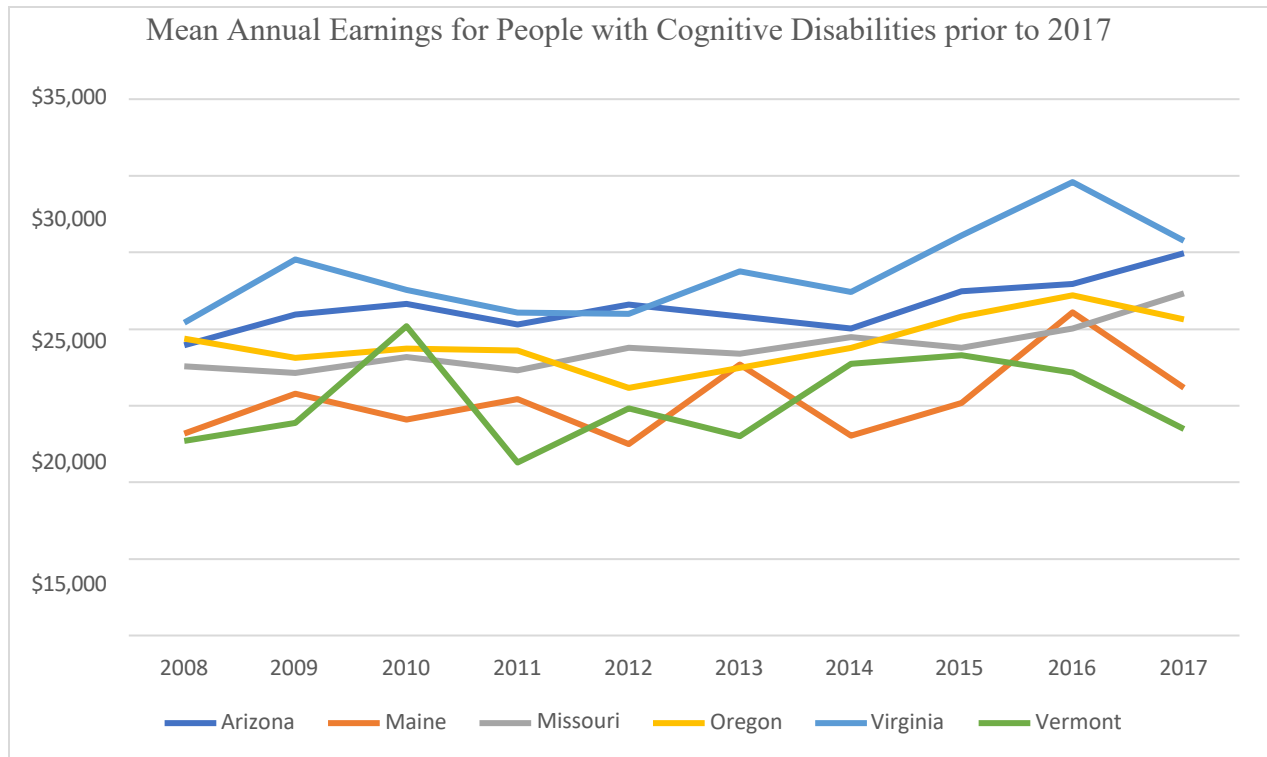
It is also worth noting that the employment rate for people with disabilities in general, and cognitive disabilities in particular, increased across five of the six states from 2016-2017. This is likely due to the nationwide strong economy in those years. Aside from Vermont, the states that permit the payment of 14(c) wages saw greater increases in the employment of people with disabilities and people with cognitive disabilities than did states that prohibit or are phasing out 14(c) wages. Nonetheless, the report states, "It is not clear whether reducing subminimum wage programs correlates with better employment rates."<sup>78</sup> Actually, it seems clear that reducing subminimum wage programs correlates with poorer employment rates. The relevant table from the report, Table 4.1, is below.

State	Disability	2016	2017
<b>Arizona</b>	All	35.1%	36.9%
	Cognitive	25.1%	27.1%
<b>Maine</b>	All	32.4%	32.9%
	Cognitive	23.3%	24.1%
<b>Missouri</b>	All	34.2%	35.9%
	Cognitive	24.9%	28.7%
<b>Oregon</b>	All	40.1%	37.0%
	Cognitive	32.5%	29.8%
<b>Vermont</b>	All	41.4%	45.9%
	Cognitive	24.4%	41.3%
<b>Virginia</b>	All	39.5%	41.3%
	Cognitive	27.3%	29.5%

It is also worth noting that the report found that employees with cognitive disabilities in Virginia and Arizona (which permit the payment of 14(c) wages) had the highest annual mean earnings *every year* since 2008 (with the exception of 2008 itself, in which Oregon barely beat out Arizona). Vermont and Maine, which have ended 14(c), overall have the lowest annual mean earnings for employees with cognitive disabilities. The chart from the report is reproduced below.

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<sup>78</sup> Report at n. 822.



Nevertheless, the Commission writes:

The Commission’s research corroborates that Oregon is a good model for coming into compliance with civil rights prohibitions against segregation of persons with disabilities. The Oregon and Vermont experiences also show that transition from sheltered workshops to competitive integrated employment may also be accomplished by concurrently eliminating subminimum wages.<sup>79</sup>

It is a mystery how Oregon can be considered a good model for anything involving employment of individuals with disabilities when it has had declines in employment and has lower wages than Arizona and Virginia.

#### *What Does “Competitive Integrated Employment” Really Mean?*

The purpose of this report is to promote “competitive integrated employment” instead of employment at a special minimum wage or in a sheltered workshop. What does “competitive integrated employment” look like in reality? We have already seen that even the people involved in making competitive integrated employment a reality in Vermont admit that not everyone who was in the sheltered workshop was able to move to a mainstream work environment. What is

<sup>79</sup> Report at n. 1303.

competitive integrated employment like for people who can move to a mainstream work environment?

Well, let's first look at the testimony of Neil Romano, approvingly quoted by the report. Mr. Romano testified:

At [the National Organization on Disability], we love our executive director, Carol Glazer, and her son Jacob, severely disabled. But he has meaningful part-time employment. Thanks to a person-centered planning model, Jacob works part-time, above minimum wage, at the NBA store in New York City. Medicaid pays for his job coach in the store.

He also volunteers in integrated settings the rest of his time, takes weekly classes in art, music, cooking, fitness, self-improvement.<sup>80</sup>

In short: 1) Jacob Glazer only works part-time; 2) Essentially, there is a second person there to help him with his job – two people are being paid for doing one job (it's just that one is being paid by Medicaid rather than Nike); and 3) He has to fill the rest of his time with other things. And this is what Romano considers a success story!

Although Romano did not specify how many hours per week Jacob Glazer works, a mother whose son works in the community, wrote to the Commission, warning about the consequences of eliminating special minimum wages. She wrote:

My son needs 1:1 support in order to keep his job and is only able to work 9 hours a week. He makes a little more than minimum wage and has had his job for 4 years. The cost of his job coach last month was \$3078 – that is to provide the support for my son to work 36 hours a month. My son will ALWAYS need this support – it's not a matter of "learning the ropes" and then being on his own with someone just keeping an eye out for him.

It's terrific that my son is able to work and there is funding for support. This is a concern that we all have when our loved ones are forced into "community" settings – how is the support going to be funded and sustained. This is a very real question that needs to be addressed prior to making ideological changes to real life concerns for real people.<sup>81</sup>

Another mother noted in her comment to the Commission that the only community-based jobs available to her daughter were for 8-12 hours per week, and usually nights and weekends.<sup>82</sup> In contrast, Lafayette Industries, the sheltered workshop where her daughter has now worked for twelve years, offers a full workday, Monday-Friday, and even has paid time off.

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<sup>80</sup> Report at n. 780.

<sup>81</sup> Public Comment 334 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>82</sup> Public Comment 475 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

Similarly, the report notes that one of the individuals interviewed by Commission staff in Vermont, C.B., works only one day per week at one integrated job, and three three-hour shifts per week at another integrated job. C.B. indicated that he preferred his current jobs to working in the sheltered workshop.<sup>83</sup> That is great! But other people with disabilities might prefer a full workday, even if it is at a sheltered workshop.

The lack of hours and jobs is something disability advocates like those at the briefing are aware of, but are careful not to mention. Here are some provisions from the settlement agreement in *Lane*:

9. DHS [Oregon Department of Human Services] shall adopt a rule requiring community development disabilities programs (“CDDPs”) and support services brokerages to encourage individuals in the Sheltered Workshop Target Population to choose options other than sheltered employment.

a. If appropriate for the individual, these options shall include non-facility- based employment and integrated day options and community inclusion services, provided in settings other than Sheltered Workshops.

b. Integrated day options include, but are not limited to, services that include regular opportunities for community-based recreational, social, educational, cultural, and athletic activities, including community volunteer activities and training activities, as well as other regularly-occurring non-facility based activities of a person’s choosing that are provided in settings with allow individuals with disabilities to interact with individuals without disabilities in a community proceeding to the fullest extent possible for the individual.<sup>84</sup>

Please remember that this litigation began when eight individuals sued, alleging that they wanted to pursue competitive integrated employment and were not being provided with appropriate supports. Then in the settlement, “more support to pursue competitive integrated employment” morphs into an effort to push people out of sheltered workshops and into competitive employment and “day programs.” The witnesses who testified at our briefing were well aware that many people with disabilities will be unable to find full-time work if the sheltered workshops are closed down, and some will not be able to find work at all. They know this because they made provisions for it in the settlement and required organizations that run sheltered workshops to push their clients toward day programs. Yet Alison Barkoff, who was formerly at DOJ, spoke glowingly of lawsuits brought by DOJ during the Obama Administration to end sheltered workshops, saying, “These lawsuits have given thousands of people the opportunity to work in competitive integrated employment.”<sup>85</sup> Maybe so. Those lawsuits have also given many people the opportunity not to work at all.

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<sup>83</sup> Report at n. 1183-1187.

<sup>84</sup> Settlement Agreement, *Lane v. Brown*, No. 3:12-cv-00138, § 9 (D. Ore. 2013), [https://www.ada.gov/olmstead/documents/lane\\_sa.pdf](https://www.ada.gov/olmstead/documents/lane_sa.pdf).

<sup>85</sup> Alison Barkoff, Transcript at p. 41.

The report elevates “inclusion” and “integration” over every other concern. Of course people with disabilities who can and want to work in integrated workplaces should be able to do so. The Commission report, however, takes the position that integration is a mandate, not an option. This seems to have been the position of the Obama-era Department of Justice, but as was so often the case in those days, DOJ went beyond the law to enforce its own policy preferences.

As the father of a woman with disabilities wrote of his daughter:

Some of the most harmful situations in her life occurred when others – well-meaning though they may have been – attempted to impose their untested ideas and one-size-fits-all notions upon her, assuming they knew best. These supposedly well-educated people, saturated with academics but lacking the two elements most essential in dealing with our kids: PRACTICAL EXPERIENCE & COMPASSION, exposed [G] to repeated ridicule and bullying from inconsiderate classmates, and misjudgments and constant guinea-pig experimentation by inadequately trained teachers and staff, to the point that some mornings she was afraid to return to class. What these do-gooders neglected to understand: in their quest to “improve society” by mainstreaming and inclusion, they never asked [G] (nor us) first. She neither wanted to [nor] benefited from their unwanted changes, and they only made things worse for her.<sup>86</sup>

The do-gooders did not stop making his daughter’s life worse after she left school. In an email to me, the same father explained that due to a constant drive for “integration,” his daughter and some of her coworkers were separated from the larger group of individuals with whom she had worked for nearly ten years. In her time at her original facility, she had progressed to being an office clerk, a “job she dearly loved”. Yet because the authorities considered the situation insufficiently integrated, she and her team had to move locations three times. Furthermore, he wrote:

It needs to be noted that under the new rules imposed by CMS and the changed WIOA [Workforce Innovation and Opportunities Act], while it lends the ‘appearance’ of inclusiveness to force the disabled into integrated community settings, in their previous center-based employment, these citizens – working where they CHOSE to work – they had the option of working up to 40 hours per week if they wished or were capable. After the forced changes, however, these same employees had their work hours cut to half or less, sometimes no more than two- hours per day a couple days per week, because in their new community-based employment setting, the new bosses had to work extra hard to carve out a whole gamut of new job titles for disabled persons they had never had on their workforce

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<sup>86</sup> Public Comment 268 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

before, and with such a government-imposed influx of less-than-skilled employees, they simply did not have enough work available for everyone.<sup>87</sup>

There is a happy ending, of sorts, for this young woman. After being dragged from pillar to post to comply with “integration” mandates, she and her team work at a large commercial laundry facility. Yet still, after three different moves, she works at a laundry facility, instead of doing the office work she enjoyed so much.

Even if *Olmstead* is a correct interpretation of the ADA, it does not require integration at all costs. Rather, Justice Ginsburg wrote, placement of individuals in community setting may be required when “the State’s treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.”<sup>88</sup> Nothing in this holding suggests that States are required to close sheltered workshops when such action is opposed by people with disabilities or their guardians, who represent their interests.

Justice Ginsburg continued:

Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, *the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities*, and the States' obligation to administer services with an even hand. Accordingly, we further hold that the Court of Appeals' remand instruction was unduly restrictive. In evaluating a State's fundamental-alteration defense, *the District Court must consider*, in view of the resources available to the State, not only *the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably*. (emphasis added)<sup>89</sup>

It seems as though the Commission simply assumes that it is preferable to spend time among those without disabilities than among those with disabilities. Those of us who do not have disabilities, particularly cognitive or behavioral disabilities, may well prefer to spend time among those who are similarly situated. Likewise, those who do have cognitive or behavioral disabilities may prefer to spend time among those who have similar disabilities – their own peers. Justice Ginsburg wrote in *Olmstead*, “We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for those unable to handle or benefit from community

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<sup>87</sup> Email from father of disabled individual to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, June 23, 2020.

<sup>88</sup> *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999).

<sup>89</sup> *Olmstead* at 597.



settings.”<sup>90</sup> Once again, the Commission mostly ignored the many family members who testified and commented as to why an “integrated” setting is not good for their children.

The report quotes Linda Hau, the mother of a man who works at a 14(c) facility. Ms. Hau said, “[w]e have also learned that inclusion is often the cruelest form of isolation” and “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.”<sup>91</sup> Ms. Hau’s comments are included in the report, but no effort is made to respond to them. If we are honest, it is because there is no response.

Many other family members struck similar notes in their comments to the Commission. “While I drove [my daughter] to her previous job in the private sector she would breakdown of sobbing. Her difficulties in dealing with the pressures and pace of regular employment were too much for her.”<sup>92</sup> “[My son] works with adults that have similar needs so they are his family as much as I am.”<sup>93</sup>

Whomever it was that came up with the idea to get rid of the workshops plainly doesn’t have a family member in the situation to need one. This reminds me very much of when my sister was in junior high school and was mainstreamed. She went from the protected environment of special education classes to the “normal” classes with other students, and this was the most traumatizing experience of her life. I was young, but I remember how bad it was. Forty years later, [D] still refers to her school as “that place.” It was “that place” at which [D’s] self-esteem was completely destroyed. She was at the mercy of a society to whom she was a freak, a retardo, a weirdo – she was different, and our society doesn’t like different. And that’s exactly what the proponents of getting rid of 14c will be doing to [D] again if they strip her of the protections 14c provides.<sup>94</sup>

Another mother wrote:

Even the definition of “integrated” employment is flawed. From [L’s] point of view, the community-based thrift store where she currently works (operated by our DT&H program by primarily handicapped people) is “integrated” with a few non-handicapped work supervisors. From the legislative point of view, many people would prefer to **keep her in the minority** and feel that “integrated” means she needs to work with a **majority of non-handicapped employees**. Truth be told, her work pace is so slow and her anxiety needs are

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<sup>90</sup> *Olmstead* at 601-602.

<sup>91</sup> Report at n. 364-365.

<sup>92</sup> Public Comment 525 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>93</sup> Public Comment 535 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

<sup>94</sup> Public Comment 352 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

so great that if she were thrust into a competitive job market, there is no possible way she could continue to be employed. Nor would she enjoy the incredible social/emotional benefits she has been receiving from her current supported work setting. A mandate of minimum wage work is equivalent to no work for her. [emphasis in original]<sup>95</sup>

The Commission even received comments from individuals with disabilities who support the continuation of 14(c). J.S. is an individual with multiple disabilities. J.S. wrote:

At MaryHaven I am able to work to the best of my abilities and earn money. I would be unable to do this anywhere else. I am treated with dignity and respect by everyone at MaryHaven. *This is very important to me as I suffered from bullying and ridicule my whole life.* [emphasis added]<sup>96</sup>

### *Consequences for Individuals and Families if 14(c) is Eliminated*

We are assured that if 14(c) is eliminated, those formerly employed under 14(c) will be gainfully employed in competitive integrated employment with all the support they need. When they are not working in mainstream employment, they will be participating in enriching extracurricular activities. Everything will be for the best in the best of all possible worlds.

There are many problems with this, but just let us address one: cost. The mother from Seattle wrote that it costs \$3078 per month for a job coach to support her son for 36 hours of work per month. The pediatrician father, whose daughter works at Beacon Industries in Tucson, Arizona (and who is a board member at Beacon), wrote:

Beacon is currently paid \$6.10 per hour from the Arizona Division of Developmental Disabilities to supervise [S] at Beacon's Center Based Employment.

If [S] would choose not to work in production and instead spend her time in a Day Treatment program, Beacon would receive \$10.61 per hour from the Arizona Division of Developmental Disabilities for providing Day Treatment and Training services. That's \$4.51 per hour more than if [S] works in production.<sup>97</sup>

The economic effects of the coronavirus pandemic are causing massive shortfalls in tax revenues for state and local governments everywhere. Many services will have to be cut. Most of us remember the local budgetary retrenchments of the 2007-2009 recession, when, for example, public libraries reduced the days and hours they were open. The pandemic will likely result in even more austerity, and it is very likely that supports such as funding for job coaches and day programs

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<sup>95</sup> Public Comment 419 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>96</sup> Public Comment 669 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>97</sup> Public Comment 1,251 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

will be cut. If there is nowhere for these individuals to spend their days, what will happen to them? A mother wrote to the Commission to tell us that her daughter works 18 hours per week in group supported employment. "If she does not have this time to train, I would have to leave my job to be at home with her and my job pays for health insurance for her and our family."<sup>98</sup>

A father wrote:

Having [S] work at Beacon allowed my wife and me to work full time as a pediatrician and a pediatric nurse. It is not safe for [S] to stay at home alone. She is pretty high maintenance, and always has my wife or me direct her activities when she is at home. She does not watch TV. This is one instance where it would be nice to have your children watch a little TV.<sup>99</sup>

### *The Loudest Voices Do Not Speak for Everyone*

The witnesses and public commenters with disabilities who spoke at our briefing are not representative of the full spectrum of the disability community. As evidenced by the fact that they were able to come and speak at the Commission, these are some of the highest-functioning members of the disability community. As one mother wrote:

There are those within the disabled adult community, employed by sheltered workshops, who are higher-functioning and have the skills necessary to hold higher paying jobs. They, unfortunately, are in the minority. However, because they are able to articulate their frustration and dissatisfaction with their lower wages, their voices are the ones the public hears. Their voices become the rallying cry for the whole movement, but do not fairly represent their peers.

In attempting to raise the wages for all within the disabled adult population, doing away with 14(c) will raise the wages of a few and guarantee failure for the masses of others who are not, and will never be, able to hold a job that justifies a minimum wage of \$15.

My daughter is fifty-nine years old. We won't address the years it took to get special education classes in our Arkansas schools. Rather, we'll look at the results of decisions made by those tasked with determining what was best for our children academically, a commission much like yours.

After functioning happily and successfully in a classroom designed for children with special needs, and because a commission decided that she, and those like her, were being labeled and discriminated against, she was 'mainstreamed'.

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<sup>98</sup> Public Comment 342 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>99</sup> Public Comment 1,251 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

At the age of fifteen, my lovely daughter endured the ridicule of classmates; the inability to grasp what was being taught (by teachers who had to teach the many and not ‘the one’) . . . the terrible isolation that comes with being different. And, her family endured the heartbreak of watching our [D] being broken by the system.

After a few years it was determined a mistake had been made; special education classes were indeed needed. Unfortunately, history repeats itself as we see from the proposal to do away with 14(c). It won’t work; it’s designed to fail. It will be enormously expensive, both monetarily and emotionally.<sup>100</sup>

Another mother wrote:

Unfortunately, a number of disability rights groups is advocating for the removal of the 14c clause. These groups certainly do not speak for me or for my son! . . .

I believe another objection by the disability rights groups is their fervent belief that everyone should have a job in an inclusive work environment. As I have stated above, in my son’s case, this is simply not an option secondary to his lack of employable skills. In addition, I think much of this desire to eliminate workshops is driven by parents of young children who are often fed the myth that everyone, regardless of their level of disability, can work in competitive employment. This myth is perpetuated by many of these disability rights groups which is very unfair. They may be dismantling something that these very parents may desire and need once their children reach adulthood and reality sets in that jobs in the competitive employment arena are few and far between. Parents of young children with severe cognitive and behavioral deficits do not yet understand that their children may not be capable of performing even the most basic jobs in the community. People with mild intellectual delay who possess relatively strong speech skills and have minimal behavioral concerns can often find jobs as bus boys in a restaurant or as clerk assistants (bag boys) in a local grocery store. However, the reality is that companies are not under any obligation to hire people with disabilities and people with severe intellectual delay, poor to nonexistence speech skills and significant behavioral issues are not hired by competitive employers. Sheltered workshops can be one productive and welcoming outlet for this group of people with disabilities.<sup>101</sup>

Yet another mother wrote:

I am well aware there are parents with adult disabled children who have advocated for the closing of sheltered workshops because they are fortunate to have a loved one capable of

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<sup>100</sup> Email from mother of disabled individual to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, July 3, 2020.

<sup>101</sup> Public Comment 433 for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

competitive employment so they want more work opportunities to be developed (and they need to be). But these parents fail to understand that competitive employment is not a one size fits all concept. Those with a developmental disability fall on a continuum ranging from adult day care programs for the most severely disabled to competitive employment with short term job coaching support for high functioning individuals. Somewhere in between is [A] and many other adults who need the support and safety of an employment training center. Please Please Please do not relegate my son to a day program by eliminating the sheltered workshops as you will break his heart and spirit. He feels like the man that he is – allow him to work as one.<sup>102</sup>

*The Report is Untethered from Reality*

This report is unmoored from reality in ways too numerous to count. However, one example might be missed. Rep. Emanuel Cleaver, (D-MO) wrote to the Commission supporting 14(c) workshops. The report quotes his letter:

In many of the rural towns in my district, sheltered workshops are essential to disabled individuals' feelings of dignity, self-worth and of being able to contribute to their communities. My staff and I have visited sheltered workshops, such as Richmond and Higginsville, and have seen first hand the importance of the disabled individual's ability to get up every morning and go to work with their friends.

Most of the towns in the rural areas of the 5<sup>th</sup> District and all of Missouri do not have the job opportunities or public transportation for disabled individuals. Section 14(c) programs provide transportation for employees. Many rural community jobs for these workers are part-time if available. Most programs that use Section 14(c) provider [*sic.*] closer to full time hours. Do not discount what this means to families. If the person with disability has shorter hours per week or no job at all, this means that another family member cannot work in order to be the caretaker.<sup>103</sup>

The report then comments:

The data from the Congressman's letter suggests that lack of public transportation and employment opportunities may contribute to over-reliance on 14(c) sheltered workshops that pay subminimum wages to persons with disabilities in his state. The Americans with Disabilities Act requires that employment opportunities and public transportation be reasonably accessible to persons with disabilities.<sup>104</sup>

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<sup>102</sup> Public Comment 355 for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

<sup>103</sup> Report at n. 1035.

<sup>104</sup> Report at n. 1036.

This throwaway comment from the report perfectly encapsulates the arrogance and unreality that underpins the entire report. None of us have visited the workshops in Congressman Cleaver's district. Most of us have never even visited the small towns in his district. Yet somehow, we think we know better than a seven-term congressman about the needs of his district.

Furthermore, the report says that the ADA "requires that employment opportunities and public transportation be reasonably accessible to persons with disabilities." Rural areas and small towns often will not have public transportation at all. There isn't a sufficient tax base to support public transportation, and the area is not dense enough to make public transportation feasible. The ADA doesn't require small towns to create public transportation systems out of whole cloth.

Complaining that public transportation in rural Missouri isn't reasonably accessible to people with disabilities is like complaining that the train to Hogwarts isn't handicapped-accessible. "[B]y regulation a public entity is required only to make 'reasonable modifications in policies, practices, or procedures' when necessary to avoid discrimination. . . . It follows that a State may not be forced to create a community-treatment program where none exists."<sup>105</sup>

The ADA cannot be interpreted to require closing sheltered workshops and requiring integration over the objections of people with disabilities or their guardians. In *Lane v. Kitzhaber*<sup>106</sup>, which resulted in the settlement that ended sheltered workshops in Oregon, the court dismissed the plaintiffs' claims. The court wrote:

[S]ome of the allegations in the Complaint go beyond the clarification offered by plaintiffs at the hearing and seek the forbidden remedy of requiring defendants to provide an adequate level of employment services to enable plaintiffs to obtain a competitive job. In particular, plaintiffs allege that defendants are violating Title II of the ADA and the Rehabilitation Act by "failing to offer an adequate array of integrated employment and supported employment services" and "to provide them with supporting employment services that would enable them to work in integrated employment settings. These allegations are subject to dismissal because they demand that defendants provide a competitive job in the community and a certain standard of care or level of benefits. Instead, to comply with the scope of plaintiffs' claims as described at the hearing, these allegations (and other related allegations) must be amended to clarify that defendants are violating Title II of the ADA and the Rehabilitation Act by denying employment services for which they are eligible with the result of unnecessarily segregating them in sheltered workshops."<sup>107</sup>

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<sup>105</sup> *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 613 (1999)(Kennedy, J., concurring).

<sup>106</sup> *Lane v. Kitzhaber*, 841 F.Supp.2d 1199 (D. Ore. 2012).

<sup>107</sup> *Lane*, 841 F.Supp.2d at 1208.

This opinion does not suggest that sheltered workshops must be eliminated, or that 14(c) wages must be eliminated. Rather, it simply says that the state must provide some supported employment services to individuals with disabilities who are capable of availing themselves of those services and wish to do so.

### *Conclusion*

Whether to maintain or eliminate 14(c) is not a Republican or Democratic issue. Our colleagues note in their findings and recommendations that there is bipartisan support for eliminating 14(c). True. They failed to note that **there is also bipartisan support for maintaining 14(c)**. Congressman Emanuel Cleaver, a Democrat, wrote to the Commission in support of 14(c), as did a number of Republican Members of Congress. Rather, it is a matter of realism and trust. The realism lies in recognizing, as so many parents have, that there are some people whose disabilities mean that their life choices are limited. The trust lies in trusting that the parents and guardians of these individuals, who know them far better than we do, can decide whether a job in competitive integrated employment, a 14(c) job in an integrated environment, a sheltered workshop, or day activities are best for their loved ones.

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## **Appendix A: Settlement Agreements Revoking 14(c) Certificates**

Settlement Agreement - Harold A. Birch Vocational Center and School

SETTLEMENT AGREEMENT

The Secretary of Labor, United States Department of Labor (“the Secretary”), acting in his official capacity, by and through his duly authorized representative, and the Providence Public School Department (“PPSD”), including but not limited to its subsidiaries, predecessors, and affiliates, (collectively the “Employer”), by their duly authorized representatives, hereby agree as follows:

WHEREAS, the Secretary is responsible for administration of and enforcement under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, (“the Act”);

WHEREAS, the Secretary, through his designated representatives in the Wage and Hour Division (“WHD”), conducted an investigation of the Employer’s work center at the Harold A. Birch Vocational Center and School in Providence, Rhode Island (“Work Center”) under Section 14(c) of the Act for the time period June 1, 2010 through June 1, 2013, (the “Investigation”);

WHEREAS, pursuant to the Investigation, the Secretary determined that the Employer willfully violated Section 14(c) the Act;

WHEREAS, pursuant to said determination and 29 C.F.R. § 525.17, the Secretary has revoked, by letter hand-delivered to the Employer on September 23, 2013, the Employers’ special minimum wage rate certificates nos. 03-04845-S-007 and 03-04845-S-008 for the period June 1, 2010 through July 31, 2013, which certificates had previously authorized the Employer to pay

certain workers with disabilities covered under Section 14(c) of the Act ("consumers") special minimum wage rates;

WHEREAS, pursuant to said revocation, the Secretary alleges that the Employer is now liable for back wages due certain consumers under Section 6 of the Act;

WHEREAS, the Employer represents that, as of April 12, 2013, it has ceased operation of the Work Center and no longer employs any consumers therein;

WHEREAS, the Secretary and the Employer (collectively "the Parties") wish to resolve all matters in controversy between them regarding the alleged violations of the Act disclosed by the Investigation without the necessity of further litigation;

NOW THEREFORE, the Parties mutually agree to the following:

I.

The Employer will comply with all applicable provisions of the Act in the future.

II.

The Employer will not contest or otherwise dispute the retroactive revocation of special minimum wage rate certificates nos. 03-04845-S-007 and 03-04845-S-008.

III.

In accordance with the process set forth below, the Employer shall remit \$250,859.98 in back wages (less legal payroll deductions) for the period June 1, 2010 through April 12, 2013 to

the consumers named in Exhibit A, which Exhibit is attached hereto and made a part hereof. The Employer shall remit to each consumer the amount listed next to said consumer's name in Exhibit A, less legal payroll deductions. The Employer shall pay such deductions to the appropriate Federal and State revenue authorities and appropriate proof of such payments shall be furnished to WHD by the Employer, as described below. The Employer is also responsible to pay its share of social security to the appropriate authorities.

#### IV.

The Employer shall remit the back wages due to the consumers named in Exhibit A in the following manner.

In fulfilling its obligations under this Settlement Agreement, the Employer shall take all actions necessary to preserve to the maximum extent possible any eligibility consumers may have for public benefits, including but not limited to providing each consumer benefits planning information and counseling from a qualified professional who (a) is experienced and certified in Social Security and SSI regulations (b) who will review the consumer's personal benefit levels, the amounts due each consumer under this Settlement Agreement, the individual needs of the consumer, and any other relevant information, and (c) will produce a written analysis, providing information to the consumer and his or her family or guardian about the impact the receipt of the back wages due may have on the consumer's public benefits. Said written analysis shall also evaluate the efficacy of and provide specific options for individual special needs trusts, pooled benefit trusts, and any other strategies reasonably available to assure that consumers make informed decisions about and retain public benefits for which they are eligible.

Once the Employer has provided the consumers the counseling set forth above, the Employer will work with each consumer to agree on a reasonable plan for distribution of the

back wages due based on said counseling and the wishes of each consumer. Such plans shall be finalized by 6/15/2014. Within ten days of such a plan being finalized, the Employer shall provide written certification to WHD that counseling has been provided and a plan agreed to by each consumer, their family or guardian for the distribution of back wages prior to disbursement of any back wages due under this Settlement Agreement. Upon request by WHD, the Employer shall promptly provide WHD any documentation concerning said plans.

V.

The Employer agrees to pay all the back wages under this Settlement Agreement on or before 3/15/2015 unless a consumer has requested and the corresponding plan has formalized a longer payment term. In no event shall the Employer remit back wages due under this Settlement Agreement later than 3/15/2020.

Within twenty days of any payment of back wages due a consumer, the Employer shall deliver to WHD evidence of payment, including the method of payment (such as a deposited check or electronic transmittal), and a statement showing the following: the Employer's Federal ID number, the name of the consumer listed in Exhibit A, the consumer's current address and social security number, the amount of back wages due the consumer as indicated in Exhibit A, the amount of each deduction taken from the back wages for the consumer's share of social security, Federal income tax and State income tax, and the net amount of back wages the consumer has received. Within twenty days of payment of all back wages due a consumer, the Employer shall deliver to WHD any signed WH-58 receipt forms the Employer has received from the consumer.

## VI.

The Employer shall use reasonable efforts to locate all consumers due back wages under this Settlement Agreement. If after reasonable efforts the Employer cannot locate certain consumers, or if a consumer refuses to accept the back wages due, the Employer agrees to deliver to WHD a cashier's or certified check, payable to "Wage and Hour Division – Labor," to cover the total net due all such consumers on or before 4/15/2014. The Employer agrees to provide WHD, due no later than 3/15/2014 a listing of all such consumers, their last known addresses, social security numbers (if possible), and the gross and net amounts owed them under this Settlement Agreement.

WHD will notify the Employer when a person has been located or has agreed to accept the back wages due, so that the counseling described above can be provided. After three years, any monies which have not been distributed because of inability to locate the proper consumer or because of refusal to accept payment shall be covered into the Treasury of the United States as miscellaneous receipts.

## VII.

The Employer shall not, under any circumstances, accept or otherwise retain any back wages due any consumer under this Settlement Agreement which were first accepted by said consumer and subsequently returned to the Employer. The Employer shall immediately remit any such back wages to the Secretary by check made payable to "Wage and Hour Division – Labor." The Employer shall thereafter have no further obligations with respect to such returned monies.

## VIII.

The Secretary shall refrain from instituting any legal action against the Employer alleging violations of Section 14(c) of the Act at the Work Center for the period June 1, 2010 through June 1, 2013.

## IX.

As set forth in the recital above, the Employer represents that, as of April 12, 2013, it has ceased operation of the Work Center and no longer employs any consumers therein. If this representation is determined to be false, the Secretary may seek additional damages from the Employer, including, without limitation, back wages, liquidated damages and/or civil monetary penalties.

## X.

This Settlement Agreement shall not in any way affect any legal right of any individual not named in Exhibit A, nor shall the Settlement Agreement in any way affect any legal right of any individual named in Exhibit A to file any legal action against the Employers alleging violations of the Act separate and apart from Section 14(c) violations at the Work Center for the period June 1, 2010 through April 12, 2013.

## XI.

The Employer may request, in the form set forth at Exhibit B, a separate written waiver from any consumer listed in Exhibit A, which waiver makes clear that, by accepting the back wages set forth in Exhibit A, the consumer waives any rights he or she might have to seek additional back wages from the Employer on account of Section 14(c) violations at the Work Center for the period June 1, 2010 through April 12, 2013. Any consumer who declines to accept the back wages set forth in Exhibit A does not waive such rights. In such an event, the

Employer shall nevertheless remit the back wages owed to said consumer to WHD by check made payable to “Wage and Hour Division – Labor.” In the event said consumer files an action against the Employer under Section 16(b) of the Act for alleged Section 14(c) violations at the Work Center for the period June 1, 2010 through April 12, 2013, and recovers back wages from the Employer, the Secretary shall remit to the Employer the back wages the Employer paid to said consumer pursuant to this Settlement Agreement.

XII.

In the event that the Employer fails to comply with the terms and conditions of this Settlement Agreement, the Secretary may, at his option, initiate such enforcement action as he deems appropriate, including, without limitation, the institution of legal action seeking enforcement of this Settlement Agreement, or legal action pursuant to Section 16(c), (e), and/or 17 of the Act, regarding any violations of Section 14(c) of the Act at the Work Center for the period June 1, 2010 through June 1, 2013. In the event the Department initiates such legal action pursuant to Section 16(c), (e), and/or 17 of the Act, the Employer agrees to waive any and all rights and defenses based upon the passage of time since June 1, 2013 including but not limited to the statute of limitations set forth at Section 6 of the Portal-to-Portal Act of 1947, and that this Settlement Agreement constitutes the sole evidence required to prove such waiver.

XIII.

Any legal action commenced for the purpose of enforcing this Settlement Agreement shall be filed in the United States District Court for the District of Rhode Island.



## XIV.

In the event that the Secretary commences an action against the Employer pursuant to Paragraph XII, the Employer shall be entitled to credit against appropriate liabilities for amounts already remitted pursuant to this Settlement Agreement.

## XV.

Any person signing this Settlement Agreement on behalf of the Employer expressly acknowledges and represents thereby that he or she has the authority to sign for and legally bind said Employer, and that he or she has read this Settlement Agreement and understands its provisions.

## XVI.

Nothing in this Settlement Agreement is binding on any governmental agency other than the United States Department of Labor.

## XVII.

Each party hereby agrees to bear its own fees and other expenses incurred in connection with any stage of this proceeding.

## XVIII.

The Employer shall send certifications, notices, deliveries and any other correspondence to WHD under this Settlement Agreement by overnight mail to the following address:

District Director


U.S. Department of Labor, Wage and Hour Division

135 High Street, Room 210

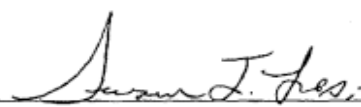
Hartford, CT 06103

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement on the dates indicated by their respective signatures:

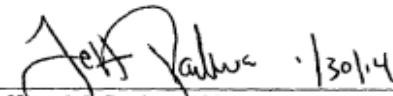
FOR THE SECRETARY OF LABOR:

Dated: February 3, 2014  
  
 For- David R. Gerrain - Acting District Director  
 Neil T. Patrick  
 District Director  
 Wage and Hour Division  
 U.S. Department of Labor

FOR THE PROVIDENCE PUBLIC SCHOOL DEPARTMENT:

Dated: January 30, 2014  
  
 By: Susan F. Lusi  
 Title: Superintendent

Approved as to form and correctness:

  
Jeffrey M. Padwa, City Solicitor

Settlement Agreement - Buckhannon-Upshur Work Adjustment Center, Inc.

SETTLEMENT AGREEMENT

The Secretary of Labor, United States Department of Labor (“the Secretary”), acting in his official capacity, by and through his duly authorized representative, and Buckhannon-Upshur Work Adjustment Center, Inc. (“B-U WAC), including but not limited to its subsidiaries, predecessors, affiliates, and successors (collectively the “Employer”), by their duly authorized representatives, hereby agree as follows:

WHEREAS, the Secretary is responsible for administration of and enforcement under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, (“the Act”);

WHEREAS, the Secretary, through his designated representative in the Wage and Hour Division (“WHD”), conducted an investigation of the Employer’s operations at 211 Little Sand Run Road, Buckhannon, WV 26201 under the Act for the period March 17, 2013 through March 6, 2016, (the “Investigation”);

WHEREAS, pursuant to the Investigation, the Secretary determined that the Employer willfully violated Section 14(c) the Act;

WHEREAS, pursuant to said determination and 29 C.F.R. § 525.17, the Secretary has revoked, by letter hand-delivered to the Employer on March 8, 2016, all special subminimum wage rate certificates issued by WHD in effect from 09/01/2012 until 08/31/2014 (certificate numbers 03-02770-S-026; 03-02770-S-027; and 03-02770-S-028) and in effect from 09/01/2014 until 08/31/2016 (certificate numbers 03-02770-S-029; 03-02770-S-030; and 03-02770-S-031) are REVOKED, which certificates had previously authorized the Employer to pay certain employees

with disabilities covered under Section 14(c) of the Act (“Employees”) special minimum wage rates;

WHEREAS, pursuant to said revocation, the Secretary alleges that the Employer is now liable for back wages due certain Employees under Section 6 of the Act;

WHEREAS, the Secretary and the Employer (collectively “the Parties”) wish to resolve all matters in controversy between them regarding the alleged violations of the Act disclosed by the Investigation without the necessity of further litigation;

NOW THEREFORE, the Parties mutually agree to the following:

I.

The Employer will comply with all applicable provisions of the Act in the future.

II.

The Employer will not contest or otherwise dispute the retroactive revocation of all special subminimum wage rate certificates issued by WHD in effect from 09/01/2012 until 08/31/2014 (certificate numbers 03-02770-S-026; 03-02770-S-027; and 03-02770-S-028) and in effect from 09/01/2014 until 08/31/2016 (certificate numbers 03-02770-S-029; 03-02770-S-030; and 03-02770-S-031) .

III.

In accordance with the process set forth below, the Employer shall remit \$48,165.936 in back wages (less legal payroll deductions) for the period March 13, 2013 through March 6, 2016 to the employees (collectively, “B-U WAC Employees”) named in Exhibit A, which Exhibit is

attached hereto and made a part hereof. The Employer shall remit to each B-U WAC Employee the amount listed next to said Employee's name in Exhibit A, less legal payroll deductions. The Employer shall pay such deductions to the appropriate federal and state revenue authorities and appropriate proof of such payments shall be furnished to WHD by the Employer, as described below. The Employer is also responsible to pay its share of social security to the appropriate authorities.

#### IV.

The Employer shall remit the back wages due to the employees named in Exhibit A in the following manner.

In fulfilling its obligations under this Settlement Agreement, the Employer shall take all actions necessary to preserve to the maximum extent possible any eligibility B-U WAC Employees may have for public benefits, including but not limited to providing each Employee benefits planning information and counseling. The Employer will review the Employee's personal benefit levels, the amounts due each Employee under this Settlement Agreement, the individual needs of the Employee, and any other relevant information, and will provide information to the Employee and his or her family or guardian about the impact the receipt of the back wages due may have on the Employee's public benefits. The information shall include an evaluation of the efficacy of and provide specific options for individual special needs trusts, pooled benefit trusts, and any other strategies reasonably available to assure that Employees make informed decisions about and retain public benefits for which they are eligible.

Once the Employer has provided the Employees the counseling set forth above, the Employer shall provide written certification to WHD that counseling has been provided to each

Employee, their family or guardian and a plan agreed to prior to disbursement of any back wages due under this Settlement Agreement.

Said counseling and said assistance shall be at no cost to the B-U WAC Employees.

V.

WHD has advised B-U WAC regarding the use of DOL Section 14(c) calculators when doing time studies and prevailing wage surveys. B-U WAC agrees, at a minimum, to use DOL Section 14(c) online calculators for the next two full certificate applications.

B-U WAC will make efforts to educate themselves through the use of DOL online PowerPoint presentations. B-U WAC further agrees to attend 14c training within the next year and has scheduled responsible staff officials for 14c compliance to attend.

VI.

The Employer agrees to pay all the back wages due to the Employees under this Settlement Agreement on or before May 27, 2016. In no event shall the Employer remit back wages due under this Settlement Agreement to a B-U WAC Employee later than May 27, 2016.

Within twenty days of any payment of back wages due a B-U WAC Employee, the Employer shall deliver to WHD evidence of payment, including the method of payment (such as a deposited check or electronic transmittal), and a statement showing the following: the Employer's Federal ID number, the name of the B-U WAC Employee listed in Exhibit A, the Employee's current address and social security number, the amount of back wages due the Employee as indicated in Exhibit A, the amount of each deduction taken from the back wages for the Employee's share of social security, federal income tax and state income tax, and the net amount of back wages the Employee has received. Within twenty days of payment of all back

wages due an Employee, the Employer shall deliver to WHD any signed WH-58 receipt forms the Employer has received from the B-U WAC Employee.

#### VII.

The Employer shall use reasonable efforts to locate all B-U WAC Employees due back wages under this Settlement Agreement. If after reasonable efforts the Employer cannot locate certain B-U WAC Employees, or if a B-U WAC Employee refuses to accept the back wages due, the Employer agrees to deliver to Assistant District Director, U.S. Department of Labor, Wage and Hour Division, 500 Quarrier Street, Suite 120, Charleston, WV 25301 a cashier's or certified check, payable to "Wage and Hour Division – Labor," to cover the total net due all such B-U WAC Employees on or before August 15, 2016. The Employer agrees to provide WHD, due no later than August 15, 2016 a listing of all such B-U WAC Employees, their last known addresses, social security numbers (if possible), and the gross and net amounts owed them under this Settlement Agreement.

WHD will notify the Employer when an Employee has been located or has agreed to accept the back wages due, so that the counseling described above can be provided.

After three years, any monies which have not been distributed because of inability to locate the proper B-U WAC Employee or because of refusal to accept payment shall be covered into the Treasury of the United States as miscellaneous receipts.

#### VIII.

The Employer shall not, under any circumstances, accept or otherwise retain any back wages due any B-U WAC Employee under this Settlement Agreement which were first accepted by said B-U WAC Employee and subsequently returned to the Employer. The Employer shall immediately deliver to Assistant District Director, U.S. Department of Labor, Wage and Hour

Division, 500 Quarrier Street, Suite 120, Charleston, WV 25301 any such back wages to the Secretary by check made payable to "Wage and Hour Division – Labor." The Employer shall thereafter have no further obligations with respect to such returned monies.

IX.

As a result of the violations referenced above, the Administrator will assess a civil money penalty against the Employer under Section 16(e) of the Act in the total amount of \$4,488.00. The Employer agrees to pay the full amount of civil money penalties, after any administrative reductions, by certified check, cashier's check, or money order made payable to "Wage and Hour Division – Labor" and mailed by the Employer to the Northeast Regional Office, The Curtis Center, Suite 850 West, 170 S. Independence Mall West, 850 West, Philadelphia, PA 19106-3317. Upon receipt of the full payment, the civil money penalty matter will then be closed.

X.

The Secretary shall refrain from instituting any legal action against the Employer alleging violations of the Act at the Work Center for the period March 13, 2013 through March 6, 2016.

XI.

The Employer represents that its employment practices are currently in compliance with all applicable provisions of the Act, as interpreted by the Secretary. If this representation is determined to be false, the Secretary may seek additional damages from the Employer, including, without limitation, back wages, liquidated damages and/or civil monetary penalties.

XII.

This Settlement Agreement shall not in any way affect any legal right of any individual not named in Exhibit A, nor shall the Settlement Agreement in any way affect any legal right of any individual named in Exhibit A to file any legal action against the Employer alleging



violations of the Act separate and apart from violations of the Act by the Employer for the period March 17, 2013 through March 6, 2016.

XIII.

In the event that the Employer fails to comply with the terms and conditions of this Settlement Agreement, the Secretary may, at his option, initiate such enforcement action as he deems appropriate, including, without limitation, the institution of legal action seeking enforcement of this Settlement Agreement, or legal action pursuant to Section 16(c), (e), and/or 17 of the Act, regarding any violations of the Act by the Employer for the period March 17, 2013 through March 6, 2016. In the event the Secretary initiates such legal action pursuant to Section 16(c), (e), and/or 17 of the Act, the Employer agrees to waive any and all rights and defenses based upon the passage of time since March 17, 2013 including but not limited to the statute of limitations set forth at Section 6 of the Portal-to-Portal Act of 1947, and that this Settlement Agreement constitutes the sole evidence required to prove such waiver.

XIV.

Any legal action commenced for the purpose of enforcing this Settlement Agreement shall be filed in the United States District Court for the Northern District of West Virginia.

XV.

In the event that the Secretary commences an action against the Employer pursuant to Paragraph XIII, the Employer shall be entitled to credit against appropriate liabilities for amounts already remitted pursuant to this Settlement Agreement.

XVI.

Any person signing this Settlement Agreement on behalf of the Employer expressly acknowledges and represents thereby that he or she has the authority to sign for and legally bind

said Employer, and that he or she has read this Settlement Agreement and understands its provisions.

XVII.

Nothing in this Settlement Agreement is binding on any governmental agency other than the United States Department of Labor.

XVIII.

Each party hereby agrees to bear its own fees and other expenses incurred in connection with any stage of this proceeding.

XVIII.

The Employer shall send certifications, notices, deliveries and any other correspondence to WHD under this Settlement Agreement by overnight mail to the following address:

Assistant District Director  
U.S. Department of Labor, Wage and Hour Division  
500 Quarrier Street, Suite 120  
Charleston, WV 25301

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement on the dates indicated by their respective signatures:

FOR THE SECRETARY OF LABOR:

Dated: 05/06/2016, 2016

Catherine L. Glencoe  
By: Catherine L. Glencoe

Title: Assistant District Director  
Wage and Hour Division  
U.S. Department of Labor

FOR BUCKHANNON-UPSHUR WORK ADJUSTMENT CENTER, INC.:

Dated: May 5, 2016

Larry W Dean  
By: Larry W Dean  
Title: Acting Director

Settlement Agreement - James L. Maher Center

SETTLEMENT AGREEMENT

The Secretary of Labor, United States Department of Labor (“the Secretary”), acting in his official capacity, by and through his duly authorized representative, and James L. Maher Center, including but not limited to its subsidiaries, predecessors, affiliates, and successors (collectively the “Employer”), by their duly authorized representatives, hereby agree as follows:

WHEREAS, the Secretary is responsible for administration of and enforcement under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.* (“FLSA”), and its applicable regulations, 29 C.F.R. Part 525, and the McNamara-O’Hara Service Contract Act, as amended, 41 U.S.C. §§ 6701-6707 (“SCA”) and its applicable regulations, 29 C.F.R. Part 4 (altogether, “the Acts”).

WHEREAS, the Secretary, through his designated representatives in the Wage and Hour Division (“WHD”), conducted an investigation of the Employer under the Acts for the time period January 17, 2015 through January 14, 2017 (the “Investigation”);

WHEREAS, pursuant to the Investigation, the Secretary determined that the Employer willfully violated Section 14(c) of the FLSA and that the Employer violated the SCA;

WHEREAS, pursuant to said determination and 29 C.F.R. § 525.17, the Secretary notified the Employer by hand-delivered letter on May 24, 2018 of the Secretary’s intent to revoke the Employer’s Section 14(c) certificates numbered 03-04853-S-022, 03-04853-S-023, 03-04853-S-026 and 03-04853-S-025 for the period January 17, 2015 through January 14, 2017, which

certificates authorized the Employer to pay certain workers with disabilities covered under Section 14(c) of the FLSA subminimum wage rates;

WHEREAS, the Employer affirms that it does not intend to apply for a certificate under Section 14(c) of the FLSA in the future;

WHEREAS, the Secretary has determined that the Employer is now liable for back wages due to certain employees with disabilities under the Acts;

WHEREAS, the Secretary and the Employer (collectively "the Parties") wish to resolve all matters in controversy between them regarding the violations of the Acts disclosed by the Investigation, without the necessity of further litigation;

NOW THEREFORE, the Parties mutually agree to the following:

I.

The Employer will comply with all applicable provisions of the Acts in the future.

II.

The Parties mutually agree that the following certificates issued pursuant to Section 14(c) of the FLSA, certificates numbered 03-04853-S-022, 03-04853-S-023, 03-04853-S-026, and 03-04853-S-025, are hereby revoked. The Employer waives any and all rights of appeal of the revocation of said certificates, and the Employer agrees that the revocation of said certificates is final and unreviewable.

## III.

In accordance with the process set forth below, the Employer shall remit \$380,541.16 in back wages (less legal payroll deductions), pursuant to the Acts , for the period January 17, 2015 through January 14, 2017, to the affected employees with disabilities (collectively, “Maher Employees”) named in Exhibit A, which Exhibit is attached hereto and made a part hereof. The Employer shall remit to each Maher Employee the amount listed next to said Maher Employee’s name in Exhibit A, less legal payroll deductions. The Employer shall pay such deductions to the appropriate Federal and State revenue authorities and appropriate proof of such payments shall be furnished to WHD by the Employer, as described below. The Employer is also responsible to pay its share of social security to the appropriate authorities.

## IV.

The Employer shall remit the back wages due to the Maher Employees named in Exhibit A in the following manner. In fulfilling its obligations under this Settlement Agreement, the Employer shall take all actions necessary to preserve to the maximum extent possible any eligibility workers with disabilities may have for public benefits, including but not limited to providing each worker with disability benefits planning information and counseling from a qualified professional who (a) is experienced and certified in Social Security and Supplemental Security Income regulations (b) who will review the worker with disability’s personal benefit levels, the amounts due each worker with disability under this Settlement Agreement, the individual needs of the worker with disability, and any other relevant information, and (c) will produce a written analysis, providing information to the worker with disability and his or her family or guardian about the impact the receipt of the back wages due may have on the worker with disability’s public benefits. Said written analysis shall also evaluate the efficacy of and

provide specific options for individual special needs trusts, pooled benefit trusts, and any other strategies reasonably available to assure that workers with disabilities make informed decisions about and retain public benefits for which they are eligible.

Once the Employer has ensured the workers with disabilities have been provided the counseling set forth above, the Employer will work with each worker with disability to agree on a reasonable plan for distribution of the back wages due based on said counseling and the wishes of each worker with disability. Such plans shall be finalized by February 1, 2020. Within ten days of such a plan being finalized, the Employer shall provide written certification to WHD that counseling has been provided and a plan agreed to by each worker with disability, their family or guardian for the distribution of back wages prior to disbursement of any back wages due under this Settlement Agreement. Upon request by WHD, the Employer shall promptly provide WHD any documentation concerning said plans.

Said counseling and said assistance on establishing said plans shall be at no cost to the workers with disabilities.

#### V.

The Employer agrees to pay all the back wages due to Maher Employees under this Settlement Agreement on or before May 1, 2020 unless a Maher Employee has requested and the corresponding plan has formalized a longer payment term.

Beginning June 30, 2020, the Employer shall deliver to WHD evidence of payment each calendar quarter. Subsequent payments are due on the final day of the first month of each successive quarter. Evidence of payment will include the method of payment (such as a deposited check or electronic transmittal), and a statement showing the following: the

Employer's Federal ID number; the name of the Maher Employee listed in Exhibit A; the Maher Employee's current address and social security number; the amount of back wages due the Maher Employee as indicated in Exhibit A; the amount of each deduction taken from the back wages for the Maher Employee's share of social security, Federal income tax and State income tax; and the net amount of back wages the Maher Employee has received. Within thirty days of payment of all back wages due a Maher Employee, the Employer shall deliver to WHD any signed WH-58 receipt forms the Employer has received from the Maher Employee, parent, guardian, or representative payee (other than the Employer) or front and back of cancelled checks.

#### VI.

The Employer shall use reasonable efforts to locate all Maher Employees due back wages under this Settlement Agreement. If after reasonable efforts the Employer cannot locate certain Maher Employees, or if a Maher Employee refuses to accept the back wages due, the Employer agrees to deliver to WHD a cashier's or certified check, payable to "Wage and Hour Division – Labor," to cover the total net due all such Maher Employees on or before June 1, 2020. The Employer agrees to provide WHD, on or before June 1, 2020, a listing of all such Maher Employees, their last known addresses, social security numbers (if possible), and the gross and net amounts owed them under this Settlement Agreement.

WHD will notify the Employer when a Maher Employee has been located or has agreed to accept the back wages due, so that the counseling described above can be provided.

After three years, any monies which have not been distributed because of inability to locate the proper Maher Employee or because of refusal to accept payment shall be covered into the Treasury of the United States as miscellaneous receipts.



## VII.

The Employer shall not, under any circumstances, accept or otherwise retain any back wages due any Maher Employee under this Settlement Agreement which were first accepted by said Maher Employee and subsequently returned to the Employer. The Employer shall immediately remit any such back wages to the Secretary by check made payable to “Wage and Hour Division – Labor.” The Employer shall thereafter have no further obligations with respect to such returned monies.

## VIII.

The Secretary shall refrain from instituting any legal action against the Employer alleging violations of the Acts for the period January 17, 2015 through January 14, 2017.

## IX.

The Employer represents that its employment practices are currently in compliance with all applicable provisions of the Acts, as interpreted by the Secretary. If this representation is determined to be false, the Secretary may seek additional damages from the Employer, including, without limitation, back wages, liquidated damages and/or civil monetary penalties.

## X.

This Settlement Agreement shall not in any way affect any legal right of any individual not named in Exhibit A, nor shall the Settlement Agreement in any way affect any legal right of any individual named in Exhibit A to file any legal action against the Employer alleging violations of the Acts separate and apart from violations of the Acts for the period January 17, 2015 through January 14, 2017.

## XI.

In the event that the Employer fails to comply with the terms and conditions of this Settlement Agreement, the Secretary may, at his option, initiate such enforcement action as he deems appropriate, including, without limitation, the institution of legal action seeking enforcement of this Settlement Agreement, or legal action pursuant to Section 16(c), (e), and/or 17 of the FLSA, regarding any violations of the FLSA for the period January 17, 2015 through January 14, 2017. In the event the Department initiates such legal action pursuant to Section 16(c), (e), and/or 17 of the FLSA, the Employer agrees to waive any and all rights and defenses based upon the passage of time since January 14, 2017 including but not limited to the statute of limitations set forth at Section 6 of the Portal-to-Portal Act of 1947, and that this Settlement Agreement constitutes the sole evidence required to prove such waiver.

XII.

Any legal action commenced for the purpose of enforcing this Settlement Agreement shall be filed in the United States District Court for the District of Rhode Island.

XIII.

In the event that the Secretary commences an action against the Employer pursuant to Paragraph XI, the Employer shall be entitled to credit against appropriate liabilities for amounts already remitted pursuant to this Settlement Agreement.

XIV.

Any person signing this Settlement Agreement on behalf of the Employer expressly acknowledges and represents thereby that he or she has the authority to sign for and legally bind said Employer, and that he or she has read this Settlement Agreement and understands its provisions.

XV.

Nothing in this Settlement Agreement is binding on any governmental agency other than the United States Department of Labor.

XVI.

Each party hereby agrees to bear its own fees and other expenses incurred in connection with any stage of this proceeding.

XVII.

The Employer shall send certifications, notices, deliveries and any other correspondence to WHD under this Settlement Agreement by overnight mail to the following address:

Assistant District Director  
U.S. Department of Labor, Wage and Hour Division  
380 Westminster Street – Room 546  
Providence, Rhode Island 02903

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement on the dates indicated by their respective signatures:

FOR THE SECRETARY OF LABOR:

Dated: September 27, 2019

U.S. Department of Labor Wage and Hour

By: David Gerrain

Title: District Director  
Wage and Hour Division  
U.S. Department of Labor

FOR \_\_\_\_\_:

Dated: September 23, 2019

James h Makee Center  
By: Rosemarie J. Motta  
Title: Chief Executive Officer

Settlement Agreement - Rock River Valley Self Help Enterprises, Inc.

**UNITED STATES DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION**

**IN THE MATTER OF:**

**ROCK RIVER VALLEY SELF HELP  
ENTERPRISES, INC.**

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WHD Case No.: 1729263

**SETTLEMENT AGREEMENT**

This Agreement is entered into by and between the United States Department of Labor, Wage and Hour Division (“DOL”), and Rock River Valley Self Help Enterprises, Inc. (“RRV Self Help” or “the Employer”).

**WHEREAS**, DOL initiated an investigation of RRV Self Help under the Fair Labor Standards Act, as amended, 29 U.S.C. § 201 *et seq.* (“the Act” or “FLSA”), covering the time period of June 1, 2013 to May 31, 2015 (“the investigation”); and

**WHEREAS**, the DOL investigation found, among other things, RRV Self Help did not, during the time period of investigation, fully and properly compensate its workers in accordance with section 14(c) of the Act and 29 CFR Part 525 and that RRV Self Help failed to make and maintain records required by section 11 of the Act and 29 CFR Part 516 and 29 CFR § 525.16; and

**WHEREAS**, RRV Self Help has denied the allegations and findings of the DOL; and

**WHEREAS**, by letter dated April 18, 2018 to RRV Self Help, the DOL revoked the Employer’s subminimum wage certificate number 05-05911-S-020, which had been issued for the period of July 1, 2012 to June 30, 2014, and denied its renewal applications for the period July 1, 2014 to June 30, 2018, stating RRV Self Help is liable for back wages due under section

6 of the Act, 29 U.S.C. § 206, to its workers who had been paid under said certificate; and

**WHEREAS**, in response to the DOL findings and letter of April 18, 2018, RRV Self Help filed a timely Petition for Review of DOL’s revocation and denial actions by letter dated June 18, 2018; and

**WHEREAS**, the Petition for Review is pending before the Wage and Hour Division (WHD) Administrator, who referred the matter to an Administrative Law Judge to make factual findings and to remit a recommended decision to the WHD Administrator, docketed as captioned above; and

**WHEREAS**, in lieu of proceeding to hearing, both DOL and RRV Self Help wish to resolve all matters in dispute between them regarding the DOL’s April 18, 2018 letter to RRV Self Help; and

**WHEREAS**, both DOL and RRV Self Help desire to ensure workers covered under this Agreement are properly compensated for work performed under section 6 of the Act, pursuant to any prospective certificate issued under section 14(c) of the Act, and desire to facilitate a resolution that protects the rights of the individuals employed by RRV Self Help under the Act and enforces the applicable legal requirements while advancing the mission and goal of RRV Self Help to provide employment opportunities to individuals with disabilities; and

**NOW, THEREFORE**, the parties to this Agreement do hereby stipulate and agree to the following:

**I**

**A.** This Agreement governs the terms and conditions of RRV Self Help’s payment of unpaid minimum wage compensation under section 6 of the Act due the employees listed on the attached **Exhibit A** for the period April 18, 2016 through April 18, 2018, and resolves DOL’s

investigation and RRV Self Help's appeal of DOL's revocation/denial action for the time period June 1, 2013 to the present.

**B.** This Agreement is limited to the compliance issues, workers, and periods identified in subparagraph A above and does not address or resolve any other issues related to compliance with the Act.

**C.** RRV Self Help assures DOL that to its knowledge there are no pending employee actions against RRV Self Help under section 16(b) of the Act. To the extent any such actions are filed after the date this Agreement is signed, but before any necessary payments are made, RRV Self Help may remove named plaintiff's back pay claim from the amounts to be remitted, to the extent the claim is covered by this Agreement.

**D.** DOL represents to RRV Self Help that the DOL does not have any investigations current or pending of RRV Self Help to determine compliance with the Act and that this Agreement resolves all findings arising out of the investigation referenced above.

## II

**A.** RRV Self Help agrees to take any and all steps necessary to ensure all employees are properly paid for all hours of work and paid in compliance with the Act.

**B.** RRV Self Help agrees, in accordance with sections 6 and 14(c) of the Act and 29 CFR § 525.12, to compensate any employees with disabilities their full earnings for all piece-rated and hourly work performed in any workweek when these workers are engaged in commerce or in the production of goods for commerce. DOL acknowledges that RRV Self Help provided the calculation of possible earnings owed to employees as a result of DOL's action to revoke its 14(c) certificate, and that the calculations submitted by RRV Self Help are acceptable.

**C.** RRV Self Help agrees to make, keep, and preserve records of its workers with

disabilities, and of its wages, hours, and other conditions and practices of employment, pursuant to section 11(c) of the Act, 29 CFR § 525.16, 29 CFR § 525.12, and 29 CFR Part 516. This includes, but is not limited to, maintaining records of all time studies conducted to determine proper commensurate wage rates, and all prevailing wage surveys. Nothing in this Agreement shall, however, compel RRV Self Help to maintain such records for time periods longer than required by state or federal law.

### III

RRV Self Help agrees to take all necessary steps to demonstrate its ability to comply with the provisions of section 14(c) of the Act prior to any filing of a subminimum wage application to DOL, and to comply with the provisions of section 14(c) of the Act during the time period covered by any subminimum wage certificate. As such, RRV Self Help agrees to the following terms:

A. If electing to apply and pay employees pursuant to a subminimum wage certificate, RRV Self Help agrees to file an application for, or request a renewal of, a section 14(c) certificate not less often than annually, for a period of three years.

B. RRV Self Help agrees to properly determine wage rates paid to workers with disabilities in any workweek that these workers are engaged in commerce or in the production of goods for commerce, pursuant to section 14(c) of the Act and 29 CFR § 525.12.

C. RRV Self Help agrees to comply with 29 CFR § 525.10 when determining the prevailing wage.

1. If prevailing wage surveys are practical as described in 29 C.F.R. § 525.10, RRV Self Help will conduct prevailing wage surveys no less often than on an annual basis, in person, at the establishment being surveyed. In these surveys, RRV Self Help will



document:

- a. the date the survey was conducted; the name of the business and the individual surveyed; the title, address, and phone number of the firm or source; and the work performed at the business; and
- b. the starting and experienced wage rates paid in the vicinity to a worker who is not disabled for the work at comparable firms who performs essentially the same type of work, to ensure the rate considered for the prevailing wage survey is for an *experienced* worker in the vicinity at a comparable firm who does not have a disability.

2. If prevailing wage surveys are not practical as described in 29 C.F.R. § 525.10, RRV Self Help will document the reasons why and will use data from the Bureau of Labor Statistics, Occupational Employment Statistics (OES) in lieu of survey information.

**D.** RRV Self Help agrees to properly determine for each worker with a disability the appropriate commensurate wage rate as required by 29 CFR § 525.12 and submit documentation of calculations for each employee that RRV Self Help expects to pay a subminimum wage to the U.S. Department of Labor, Wage and Hour Division, Attn: Section 14(c) Coordinator, 230 S. Dearborn, Room 412, Chicago, IL 60604, at the time it next applies to the DOL for a section 14(c) certificate.

**E.** RRV Self Help acknowledges it is required to pay at least the full federal minimum wage to all covered employees who are not paid pursuant to a subminimum wage certificate.

#### IV

Prior to or in conjunction with applying for a certificate under section 14(c) of the Act, RRV Self Help agrees to the following:

**A.** Within 3 months of execution of this Agreement, RRV Self Help will hold mandatory training for all staff, managers, and executives on compliance with section 14(c) of the Act. The training shall be conducted by a third party consultant with experience providing section 14(c) compliance assistance. Specifically, the training will explain, but is not limited to, the requirements imposed by 29 CFR Part 525, and Wage and Hour Fact Sheets 39, 39A, 39B, 39C, 39D, 39E, 39F, 39H, and 39I. RRV Self Help shall distribute these Fact Sheets as part of the mandatory training. Employees will sign a written acknowledgement that they have received the Fact Sheets and were present during the training.

**B.** RRV Self Help will train all new staff and managers, within 30 days of starting employment, on the requirements of section 14(c) of the Act, including the requirements imposed by 29 CFR Part 525, and will require new staff and managers to read Wage and Hour Fact Sheets 39, 39A, 39B, 39C, 39D, 39E, 39F, 39H, and 39I.

**C.** RRV Self Help will submit documentary proof of the training required by this section to the U.S. Department of Labor, Wage and Hour Division, Attn: Section 14(c) Coordinator, 230 S. Dearborn, Room 412, Chicago, IL 60604, at the time it applies to DOL for a section 14(c) certificate or to renew its certificate and for each application submission for the next three years. RRV Self Help may comply with this requirement by showing training of new employees was scheduled and attended by the new employee. All content taught in the training required by this section must be consistent with 29 CFR Part 525 and Wage and Hour Fact Sheets 39, 39A, 39B, 39C, 39D, 39E, 39F, 39H, and 39I.

## V

RRV Self Help agrees to implement the following recordkeeping practices, prior to, or concurrent with, applying to renew its section 14(c) certificate:

**A.** Each worker will have his or her own time and production card, designated to him or her, for each workweek.

**B.** Daily hours worked and total daily production in piece-rate work performed by the employee will be recorded on the worker's time and production card.

**C.** For daily production of piece-rate work, the time and production card assigned to each individual worker will record the job number(s) corresponding to the work performed on any given day, the determined commensurate wage rate(s) for the corresponding job(s), the total time spent in production, and the total daily production performed by the worker with a disability on each job.

**D.** For work performed in supported employment positions, the time and production card assigned to each individual worker will record the date work was performed, the work start time, the work end time, total hours worked by the worker with a disability at the site(s) of work, the departure time(s) from the site(s) of work, and the arrival time at the employer's establishment.

**E.** Time and production cards will be submitted daily by staff members to a designated supervisor. The total daily hours worked and total daily production of piece-rate work performed by each worker with a disability will be recorded in RRV Self Help's payroll system or equivalent master spreadsheet on a daily basis.

## VI

Should RRV Self Help resume paying under section 14(c) certificate authority, RRV Self Help agrees, from the date of issuance of such certificate, to the following additional terms:

**A.** RRV Self Help will give each worker paid at a subminimum wage, and/or his or her guardian, a copy of the poster WH-1284 and will inform each worker and/or his or her

guardian (verbally and in writing) of the terms of the certificate under which they are being paid, as described in 29 C.F.R. § 525.12(g).

**B.** RRV Self Help will post the WH-1284 poster in a prominent location for viewing by all employees and provide photographic proof that it has been so posted. RRV Self Help will submit this proof to the U.S. Department of Labor, Wage and Hour Division, Attn: Section 14(c) Coordinator, 230 S. Dearborn, Room 412, Chicago, IL 60604, as soon as the poster has been posted after receiving any new section 14(c) certificate and at the time of any renewal application submission for the next three years.

**C.** RRV Self Help will complete the items in paragraphs A and B of this section within 7 working days of the effective date of the new certificate or within 7 working days of each new employee's first day of employment.

**D.** RRV Self Help will annually conduct training programs on the requirements imposed by 29 CFR Part 525, and Wage and Hour Fact Sheets 39, 39A, 39B, 39C, 39D, 39E, 39F, 39H, and 39I, and other topics as needed, for all staff, including but not limited to all floor supervisors and all employees working directly with the workers with disabilities, in each of the next 3 calendar years. After 3 years, RRV Self Help will train new and existing staff as needed.

## VII

Should RRV Self Help resume paying under section 14(c) certificate authority, RRV Self Help agrees to maintain full compliance with section 511 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701 *et seq.*, as outlined in Field Assistance Bulletins 2016-2 and 2019-1 and Fact Sheet 39H. RRV Self Help must review and verify each of the required services has been documented and completed by the Designated State Unit (DSU) and/or the Employer, as applicable, within the timeframes required and, as appropriate.

**A.** For all employees paid at a subminimum wage prior to July 22, 2016, RRV Self Help will review documentation and ensure they are provided with career counseling, information, and referrals by the DSU and will itself provide these employees with information about self-advocacy, self-determination, and peer mentoring training opportunities in the local geographic area, no later than July 22, 2019, and by July 22 of each year thereafter.

**B.** For new hires, RRV Self Help will review documentation and ensure they are provided with career counseling, information, and referrals by the DSU and will itself provide these employees with information about self-advocacy, self-determination, and peer mentoring training opportunities in the local geographic area every 6 months for the first year of subminimum wage employment and annually thereafter based on the anniversary of the date of their employment at a subminimum wage.

**C.** For each youth, 24 years of age and younger, hired at subminimum wage after July 22, 2016, RRV Self Help will review and maintain documentation affirming the employee has received all required transition and vocational rehabilitation services, and career counseling, referrals, and information prior to employment at a subminimum wage.

## VIII

**A.** RRV Self Help agrees to refer and pay for benefits counseling for the workers receiving back wages under the terms of this Agreement. An independent third party must provide the benefits counseling and must be competent to help workers minimize the impact of receiving unpaid wages on their current benefits. This counseling may be provided by access to a designated person or organization brought into RRV Self Help's facility to meet one-on-one with individuals. The benefits counseling must be provided no later than 45 days from the date this Agreement is executed. This deadline may be extended an additional 30 days, upon request

of the benefits counselor, by notifying DOL in writing of the need for such extension.

**B.** RRV Self Help will inform the benefits counselor and any inquiring employees that employees choosing to receive payments resulting from this Agreement in a form other than a lump sum payment, should send their instructions to United States Department of Labor, Midwest Regional Office, Wage and Hour Division, P.O. Box 2638, Chicago, Illinois 60690-2638 no later than 60 days from the date this Agreement is executed.<sup>1</sup>

## IX

**A.** RRV Self Help shall pay a total amount of **\$573,836.90** to the United States Department of Labor in a single, initial payment, and then 17 additional installment payments to include interest over an 18 month period, in accordance with the installment schedule set forth in **Exhibit B**. The initial payment of **25% of the total** has been delivered to DOL's counsel by RRV Self Help submitting a certified check or cashier's check payable to "United States Department of Labor - Wage and Hour Division," or by wire transfer. RRV Self Help shall also deliver to DOL's counsel, at the time of executing this Agreement, a schedule listing the name, last-known address, social security number, and back wages of each employee listed on **Exhibit A**. All payments processed by RRV Self Help to DOL shall first be calculated for payroll taxes owed by RRV Self Help. DOL shall, at the time of disbursement, be responsible for administering the withholding of any payroll taxes or other deductions from the payments to individual employees. DOL shall also provide RRV Self Help with a quarterly statement showing the amounts of payments made to individual employees for each quarter.

**B.** In exchange for the installment payment plan herein, RRV Self Help will execute a hanging Consent Judgment, attached and incorporated herein as **Exhibit C** to this Agreement.

<sup>1</sup> Upon permission by the employee, the benefits counselor will submit instructions to the address above.

If payments are not made in accordance with the installment schedule found in **Exhibit B**, then the Secretary may file the Consent Judgment in Federal District Court.

**C.** On or before each installment date set forth in **Exhibit B**, RRV Self Help shall deliver to the United States Department of Labor, a certified or cashier's check made payable in the aggregate gross amount of each installment payment identified herein, to "United States Department of Labor – Wage and Hour Division." RRV Self Help's payment of each of the installments shall be sent to the following address: United States Department of Labor, Midwest Regional Office, Wage and Hour Division, P.O. Box 2638, Chicago, Illinois 60690-2638.

**D.** The payments shall be made on or before the dates set forth in **Exhibit B**, until the full amount has been paid, which shall include interest on the installment payments at the regular rate of 1 percent, as determined by the U.S. Treasury as required by the Debt Collection Improvement Act of 1996 (P.L. 104-134). If RRV Self Help fails to meet any of these deadlines, upon notification to the Director of RRV Self Help and with a copy to its counsel, the Secretary may file the Consent Judgment, attached as Exhibit C, in the U.S. District Court for the Northern District of Illinois, requiring, *inter alia*, RRV Self Help to pay post-judgment interest on the payment amounts set forth in Exhibit B.

**E.** The DOL shall distribute the proceeds of each installment payment (less legal deductions for each employee's share of social security and Federal withholding taxes for back wages) to the persons identified in **Exhibit A**, or to their estates, if that be necessary. If DOL receives instructions pursuant to paragraph VIII.B, DOL shall follow those instructions in distributing proceeds, unless such instructions are unlawful or fail to serve the purpose of fully compensating persons identified in **Exhibit A**.

**F.** Any amounts referenced above of unpaid compensation not so paid within a

period of three (3) years from the date of receipt thereof (unless being held for later payment per paragraphs VIII.B and IX.G, in which case the applicable time period shall be three years from the last date of the proposed distribution) shall, pursuant to section 16(c) of the Act, be covered into the Treasury of the United States as miscellaneous receipts. RRV Self Help remains responsible for their employer share of applicable taxes.

**G.** RRV Self Help shall not request, solicit, suggest, or coerce, directly or indirectly, any employee to waive or refuse payment of back wages, or to return any money in the form of cash, check or any other form for wages previously due or to become due in the future to said employee nor shall RRV Self Help accept or receive from any employee, directly or indirectly, any money in the form of cash, check or other form for wages paid to said employee under the provisions of this Agreement or the Act. RRV Self Help shall not discharge or in any other manner discriminate, nor solicit or encourage anyone else to discriminate, against any employee because the employee has received or retained money due from RRV Self Help under the provisions of this Agreement or the Act.

## **X**

Should RRV Self Help fail to make any of the installments referenced herein on or before the due date provided herein, these unpaid compensation amounts plus post-judgment interest shall become immediately due and payable without further notice or demand by DOL against RRV Self Help, in accordance with the terms of the Consent Judgment, attached as **Exhibit C**.

## **XI**

**A.** RRV Self Help agrees to withdraw its Petition for Review of DOL's April 18, 2018 letter revoking its 2012 certificate under section 14(c) of the Act and denying its pending 2014 and 2016 renewal applications under section 14(c) of the Act.



**B.** DOL and RRV Self Help agree RRV Self Help may apply for a certificate under section 14(c) of the Act. DOL agrees that the notice of revocation and underlying investigation will not prevent or prejudice the decision to issue the certificate. The Parties agree that the terms of this Agreement are structured to aid RRV Self Help's compliance with the section 14(c) program and applicable laws and regulations so that it may obtain a subminimum wage certificate. If, upon review of documents provided by RRV Self Help, DOL determines RRV Self Help is in compliance with the terms of this Agreement and with the applicable statutory and regulatory requirements for issuance of a section 14(c) certificate, and absent any other information that reflects new concerns by DOL over violations or non-compliance since the investigation period ended, RRV Self Help's application for a certificate under section 14(c) of the Act shall be granted. DOL agrees, as an express part of the consideration for RRV Self Help's entry into this Agreement, that any such application will be processed in accordance with its usual and customary timeline, which DOL represents at this time as usually occurring 4 to 6 weeks after submission of a complete and correct application.

## **XII**

**A.** The DOL may investigate compliance with this Agreement and take appropriate action to enforce the terms of this Agreement. By entering into this Agreement, the parties intend this as a full and final resolution of all matters related to the investigation and revocation/denial letter, and RRV Self Help's 14(c) certificates/applications for 2012, 2014, and 2016. Subject to the above, the DOL does not waive its right to conduct future investigations of RRV Self Help and affiliated entities under the Act and to take appropriate enforcement action with respect to present or future violations disclosed by such investigations including, but not limited to, an action under sections 17 and 16(c) for injunctive relief and collection of back

wages and liquidated damages, as well as assessment of civil money penalties under section 16(e) of the Act.

**B.** Except as provided above, by entering into this Agreement, RRV Self Help does not waive any objections, privileges, or defenses it may have with respect to any future investigation, assessment of civil money penalties, action under sections 17, 16(c), and 16(e) of the Act or other proceeding between the parties, or otherwise concede that any past alleged violations would have been proven by the DOL at hearing.

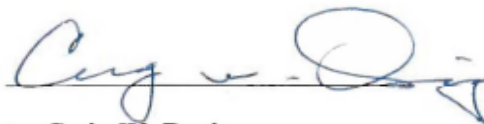
**C.** By entering into this Agreement, the DOL does not waive its right to take appropriate action, to investigate future matters, should the employer obtain a certificate to employ persons with disabilities at subminimum wage rates under section 14(c) of the Act and 29 CFR Part 525.

**D.** RRV Self Help's compliance with the full terms of this Agreement shall not alleviate the requirement to comply with future obligations under section 14(c) of the Act or the regulations promulgated thereunder, as applicable.

**E.** Each party agrees to bear its own costs, attorney's fees, and other expenses incurred by each such party in connection with any stage of this proceeding to date including, but not limited to, all costs referenced under the Equal Access to Justice Act, as amended.

Date: May 28, 2019

**ROCK RIVER VALLEY SELF  
HELP ENTERPRISES, INC.**

By: 

Print: Craig W. Dusing

Its: President of the Board of Directors  
Authorized Representative

Approved as to form:



**TIMOTHY B. ZOLLINGER**  
Ward, Murray, Pace & Johnson, PC

**KATE S. O'SCANLAIN**  
Solicitor of Labor

**CHRISTINE Z. HERI**  
Regional Solicitor

  
**ELIZABETH K. ARUMILLI**  
Attorney

  
**MICHAEL LAZZERI**  
Regional Administrator, Midwest Region,  
Wage and Hour Division

Settlement Agreement - Training Thru Placement, Inc.

SETTLEMENT AGREEMENT

The Secretary of Labor, United States Department of Labor (“the Secretary”), acting in his official capacity, by and through his duly authorized representative, and Training Thru Placement, Inc. (“TTP”), including but not limited to its subsidiaries, predecessors, affiliates, and successors (collectively the “Employer”), by their duly authorized representatives, hereby agree as follows:

WHEREAS, the Secretary is responsible for administration of and enforcement under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, (“the Act”);

WHEREAS, the Secretary, through his designated representatives in the Wage and Hour Division (“WHD”), conducted an investigation of the Employer’s operations at 20 Marblehead Avenue, North Providence, Rhode Island (“Work Center”) under the Act for the time period June 1, 2010 through January 31, 2013, (the “Investigation”);

WHEREAS, pursuant to the Investigation, the Secretary determined that the Employer willfully violated Section 14(c) the Act;

WHEREAS, pursuant to said determination and 29 C.F.R. § 525.17, the Secretary has revoked, by letter hand-delivered to the Employer on June 12, 2013, the Employer’s special minimum wage rate certificates nos. 03-04582-S-006 and 03-04582-S-008 for the period June 1, 2010 through January 31, 2013, which certificates had previously authorized the Employer to pay

certain workers with disabilities covered under Section 14(c) of the Act (“Consumers”) special minimum wage rates;

WHEREAS, pursuant to said revocation, the Secretary alleges that the Employer is now liable for back wages due certain Consumers under Section 6 of the Act;

WHEREAS, pursuant to the Investigation, the Secretary also alleges that the Employer is now liable for back wages due certain non-Consumer TTP employees under Section 7 of the Act;

WHEREAS, the Secretary and the Employer (collectively “the Parties”) wish to resolve all matters in controversy between them regarding the alleged violations of the Act disclosed by the Investigation without the necessity of further litigation;

NOW THEREFORE, the Parties mutually agree to the following:

I.

The Employer will comply with all applicable provisions of the Act in the future.

II.

The Employer will not contest or otherwise dispute the retroactive revocation of special minimum wage rate certificates nos. 03-04582-S-006 and 03-04582-S-008.

III.

In accordance with the process set forth below, the Employer shall remit \$300,000 in back wages (less legal payroll deductions) for the period June 1, 2010 through January 31, 2013

to the Consumers and non-Consumer TTP employees (collectively, “TTP Employees”) named in Exhibit A, which Exhibit is attached hereto and made a part hereof. The Employer shall remit to each TTP Employee the amount listed next to said TTP Employee’s name in Exhibit A, less legal payroll deductions. The Employer shall pay such deductions to the appropriate Federal and State revenue authorities and appropriate proof of such payments shall be furnished to WHD by the Employer, as described below. The Employer is also responsible to pay its share of social security to the appropriate authorities.

#### IV.

The Employer shall remit all back wages due to the non-Consumer TTP employees named in Exhibit A by delivering to WHD at the address set forth in Paragraph XVIII on or before December 3, 2014 individual net checks for said back wages made payable to: “[individual non-Consumer TTP employee] or Wage and Hour Division-Labor.” Concurrently with said checks, the Employer shall deliver to WHD a statement showing the following: the Employer’s Federal ID number, the name of the non-Consumer TTP employee listed in Exhibit A, the non-Consumer TTP employee’s current address and social security number, the amount of back wages due the non-Consumer TTP employee as indicated in Exhibit A, the amount of each deduction taken from the back wages for the non-Consumer TTP employee’s share of social security, Federal income tax and State income tax, and the net amount of back wages the non-Consumer TTP employee has received.

#### V.

The Employer shall remit the back wages due to the Consumers named in Exhibit A in the following manner.

In fulfilling its obligations under this Settlement Agreement, the Employer shall take all actions necessary to preserve to the maximum extent possible any eligibility Consumers may have for public benefits, including but not limited to providing each Consumer benefits planning information and counseling from a qualified professional who (a) is experienced and certified in Social Security and SSI regulations (b) who will review the Consumer's personal benefit levels, the amounts due each Consumer under this Settlement Agreement, the individual needs of the Consumer, and any other relevant information, and (c) will produce a written analysis, providing information to the Consumer and his or her family or guardian about the impact the receipt of the back wages due may have on the Consumer's public benefits. Said written analysis shall also evaluate the efficacy of and provide specific options for individual special needs trusts, pooled benefit trusts, and any other strategies reasonably available to assure that Consumers make informed decisions about and retain public benefits for which they are eligible.

Once the Employer has provided the Consumers the counseling set forth above, the Employer will work with each Consumer to agree on a reasonable plan for distribution of the back wages due based on said counseling and the wishes of each Consumer. Such plans shall be finalized by May 3, 2015. Within ten days of such a plan being finalized, the Employer shall provide written certification to WHD that counseling has been provided and a plan agreed to by each Consumer, their family or guardian for the distribution of back wages prior to disbursement of any back wages due under this Settlement Agreement. Upon request by WHD, the Employer shall promptly provide WHD any documentation concerning said plans.

Said counseling and said assistance on establishing said plans shall be at no cost to the Consumers.

## VI.

The Employer agrees to pay all the back wages due to Consumers under this Settlement Agreement on or before November 3, 2017 unless a Consumer has requested and the corresponding plan has formalized a longer payment term. In no event shall the Employer remit back wages due under this Settlement Agreement to a Consumer later than November 3, 2020.

Within twenty days of any payment of back wages due a Consumer, the Employer shall deliver to WHD evidence of payment, including the method of payment (such as a deposited check or electronic transmittal), and a statement showing the following: the Employer's Federal ID number, the name of the Consumer listed in Exhibit A, the Consumer's current address and social security number, the amount of back wages due the Consumer as indicated in Exhibit A, the amount of each deduction taken from the back wages for the Consumer's share of social security, Federal income tax and State income tax, and the net amount of back wages the Consumer has received. Within twenty days of payment of all back wages due a Consumer, the Employer shall deliver to WHD any signed WH-58 receipt forms the Employer has received from the Consumer.

## VII.

The Employer shall use reasonable efforts to locate all TTP Employees due back wages under this Settlement Agreement. If after reasonable efforts the Employer cannot locate certain TTP Employees, or if a TTP Employee refuses to accept the back wages due, the Employer agrees to deliver to WHD a cashier's or certified check, payable to "Wage and Hour Division – Labor," to cover the total net due all such TTP Employees on or before January 3, 2015 for non-Consumer TTP employees, and on or before December 3, 2017 for all Consumers. The Employer agrees to provide WHD, due no later than December 3, 2014 for non-Consumer TTP



employees and no later than November 3, 2017 for all Consumers, a listing of all such TTP Employees, their last known addresses, social security numbers (if possible), and the gross and net amounts owed them under this Settlement Agreement.

WHD will notify the Employer when a Consumer has been located or has agreed to accept the back wages due, so that the counseling described above can be provided.

After three years, any monies which have not been distributed because of inability to locate the proper TTP Employee or because of refusal to accept payment shall be covered into the Treasury of the United States as miscellaneous receipts.

#### VIII.

The Employer shall not, under any circumstances, accept or otherwise retain any back wages due any TTP Employee under this Settlement Agreement which were first accepted by said TTP Employee and subsequently returned to the Employer. The Employer shall immediately remit any such back wages to the Secretary by check made payable to "Wage and Hour Division – Labor." The Employer shall thereafter have no further obligations with respect to such returned monies.

#### IX.

The Secretary shall refrain from instituting any legal action against the Employer alleging violations of the Act at the Work Center for the period June 1, 2010 through January 31, 2013.

#### X.

The Employer represents that its employment practices are currently in compliance with all applicable provisions of the Act, as interpreted by the Secretary. If this representation is determined to be false, the Secretary may seek additional damages from the Employer, including, without limitation, back wages, liquidated damages and/or civil monetary penalties.

## XI

This Settlement Agreement shall not in any way affect any legal right of any individual not named in Exhibit A, nor shall the Settlement Agreement in any way affect any legal right of any individual named in Exhibit A to file any legal action against the Employer alleging violations of the Act separate and apart from violations of the Act at the Work Center for the period June 1, 2010 through January 31, 2013.

## XII

In the event that the Employer fails to comply with the terms and conditions of this Settlement Agreement, the Secretary may, at his option, initiate such enforcement action as he deems appropriate, including, without limitation, the institution of legal action seeking enforcement of this Settlement Agreement, or legal action pursuant to Section 16(c), (e), and/or 17 of the Act, regarding any violations of the Act at the Work Center for the period June 1, 2010 through January 31, 2013. In the event the Secretary initiates such legal action pursuant to Section 16(c), (e), and/or 17 of the Act, the Employer agrees to waive any and all rights and defenses based upon the passage of time since June 1, 2012 including but not limited to the statute of limitations set forth at Section 6 of the Portal-to-Portal Act of 1947, and that this Settlement Agreement constitutes the sole evidence required to prove such waiver.

## XIII

Any legal action commenced for the purpose of enforcing this Settlement Agreement shall be filed in the United States District Court for the District of Rhode Island.

## XIV.

In the event that the Secretary commences an action against the Employer pursuant to Paragraph XII, the Employer shall be entitled to credit against appropriate liabilities for amounts already remitted pursuant to this Settlement Agreement.

## XV.

Any person signing this Settlement Agreement on behalf of the Employer expressly acknowledges and represents thereby that he or she has the authority to sign for and legally bind said Employer, and that he or she has read this Settlement Agreement and understands its provisions.

## XVI.

Nothing in this Settlement Agreement is binding on any governmental agency other than the United States Department of Labor.

## XVII.

Each party hereby agrees to bear its own fees and other expenses incurred in connection with any stage of this proceeding.

## XVIII.

The Employer shall send certifications, notices, deliveries and any other correspondence to WHD under this Settlement Agreement by overnight mail to the following address:

District Director  
U.S. Department of Labor, Wage and Hour Division  
135 High Street, Room 210  
Hartford, CT 06103

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement on the dates indicated by their respective signatures:

FOR THE SECRETARY OF LABOR:

Dated: NOV. 10, 2014

Michelle B. Garvey

By: MICHELLE B. GARVEY

Title: DISTRICT DIRECTOR  
U.S. Department of Labor

FOR TRAINING THRU PLACEMENT, INC.:

Dated: \_\_\_\_\_, 2014

\_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement on the dates indicated by their respective signatures:

FOR THE SECRETARY OF LABOR:

Dated: \_\_\_\_\_, 2014

\_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

U.S. Department of Labor

FOR TRAINING THRU PLACEMENT, INC.:

Dated: November 10, 2014

  
\_\_\_\_\_

By: David Darlington

Title: Authorized Representative