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**Briefing of the U.S. Commission on Civil Rights**

**On the payment of subminimum wages to people with disabilities**

**November 15, 2019**

Chair Lhamon, Vice Chair Timmons-Goodson, and esteemed Commissioners, thank you for the opportunity to testify at this briefing. As most anyone who’s spent more than a few minutes with me knows, there isn’t a topic I feel more strongly about than ending subminimum wages for people with disabilities. And as Chairman of the National Council on Disability – a federal advisory body – we have a considerable body of work in this area that has looked into many of the same questions that you’re asking the panelists today. We commend you for taking on this topic within a civil rights framework. You’re asking a lot of the right questions.

Given NCD’s role as an advisory body, I think it’s important to begin by stating up front for the record that since 2012, NCD has recommended that Congress eliminate the 14(c) provision of the Fair Labor Standards Act, which permits employers to pay people with disabilities a subminimum wage, and last year, we recommended that the U.S. Department of Labor (DOL) impose a moratorium on the issuance of any new 14(c) certificates and strengthen overall enforcement of the program, as a first step toward the total elimination of the program. There is simply no place in American society today for the idea – let alone a federal law that codifies the concept – that people with disabilities are lesscapable and therefore not deserving to earn at least the federally mandated minimum wage for their work.

The guiding principle of all of NCD’s work is to apply the vision of the Americans with Disabilities Act (ADA) to assure equality of opportunity for all and eliminate policies that discriminate on the basis of disability. 14(c) is plainly and simply just that, a law which legalizes treating Americans with disabilities differently than other citizens, and no matter how much flowery rhetoric or emotion some people wrap 14(c) in, it is just that…discrimination.

Some people will testify before this body about the importance of maintaining the “choice” or option to work for subminimum wages, and it is vital that the Commission not lose sight of the importance of examining these issues against the backdrop of national policy goals tied to the advancement of the civil rights of people with disabilities. Given NCD’s recent research on 14(c), the information I share with you today will rely heavily on our 2018 report, titled *New Deal to Real Deal, as* well as our 2018 *Progress Report*, both available on NCD’s website at www.ncd.gov.

**Old Goals and New Goals**

The national policy goals of the ADA are to assure **equality of opportunity, full participation, independent living,** and **economic self-sufficiency**. Each one of these 30-year old national policy goals is compromised if not made impossible as long as paying people with disabilities subminimum wages for their work persists.

14(c) is a policy relic of the New Deal and is now 81 years old, and it’s helpful to remember its age and origins throughout the day today. It became legal to pay people with disabilities below the minimum wage for their work in 1938, when there were no federally protected civil rights for people with disabilities, nor even a right to a public education. Anything done for people with disabilities at that time – like affording them the “opportunity” to earn pennies and hour – could be viewed as charity against the backdrop of the prevailing views of disability of the day. However, since that time, 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 than “opportunity” for working for pennies an hour – words like discrimination and exploitation.

**Federal Protections for Those Earning Subminimum Wages**

Federal protections for those earning subminimum wages rely upon oversight and enforcement of 14(c) requirements by the Wage and Hour Division (WHD) of the U.S. Department of Labor; enforcement of Section 511 of the Workforce Innovation and Opportunity Act’s provisions that proscribe contracts between schools and 14(c) certificate holders by the Rehabilitation Services Administration; enforcement of employment discrimination complaints by the Equal Employment Opportunity Commission; and investigations by the U.S. Department of Justice into potential ADA violations.

**Areas that Lack Federal Protections**

Just as important as the mechanisms by which the federal government protects the civil rights of people with disabilities, is a discussion of the ways in which it does not. To understand the areas in which the federal protections are lacking, it’s important to briefly unpack the doublespeak in the narrative of many community rehabilitation providers (CRPs), some of whom you’ll hear from today. On the one hand, these organizations will make regular reference to people with disabilities they serve as “workers” and “employees;” that their *employees* love the *work* they are doing; and that there is dignity in the *jobs* these individuals are doing and the *paychecks* they’re earning, however meager. And to be clear, whether performing rote tasks like bagging screws or untangling wire hangers, there is financial benefit to the CRPs in the work these individuals are providing. In many instances, the individuals are performing tasks that fulfill contracts the CRPs have with outside businesses. So yes, it is work, and someone is gaining benefit from that work…but sadly…it is not the person with a disability.

On the other hand, in spite of prolific employment terminology and the financial benefit to the CRPs of the work performed, in other contexts, CRPs represent they are merely providing “job training,” not jobs. In interpretation letters from the Occupational Safety and Health Administration (OSHA) in response to queries from sheltered workshop providers who have requested clarity regarding the applicability of OSHA recordkeeping requirements on sheltered workshops, OSHA has stated that sheltered workshops are an exempt industry as “job training and vocational rehabilitation” providers, and thus do not need to keep OSHA injury and illness records.[[1]](#footnote-1)

As someone who has toured dozens of sheltered workshops around the country – some very clean and well-lit and others dirty, dark, hot, and unventilated, it should concern everyone that there is no requirement to report injury and illness that may occur in facilities where some of the most vulnerable Americans work.

But also, you can’t have it both ways --14(c) is either work or it is training. If it is work, then it is clearly discriminatory. And if it is training, it has been one of the most, if not *the* most, abysmal failures in job training programs in history with many of the people with disabilities subject to this “training” for 20, 30, even 40 and more years, shuttered away in gulags of indifference, many times without any meaningful connection to the community…. Or hope for the future.

**DOL Oversight of 14(c)**

Although WHD tracks the total number of employers holding a 14(c) certificate, there is no accurate count of the total number of workers with disabilities being paid subminimum wages. Aside from an estimate as a part of the application process, employers are not required to submit such information to WHD. This leaves room for widely divergent figures cited in different places. In a single month last year, for example, WHD cited estimates of the number of workers employed by 14(c) certificate holders to the Council and Congress ranging from approximately 141,081 to 321,131 employees.

According to a letter I received from the Deputy Secretary of Labor to my NCD office in December 2018 -- in Fiscal Year 2017, WHD investigated 8.5% of its 14(c) certificate holders.[1] In 2017 alone, WHD investigated 217 cases, 90% of which were found to have violated 14(c) requirements, resulting in nearly $2.5 million dollars in back wages impacting 7,302 employees.[2] In 2018, WHD investigated 201 more cases, 83% of which were found with violations, resulting in nearly $2.6 million in back wages and impacting 9,133 employees.

The percentage of violations and the amount of back wages reclaimed is a testament to the proliferation of problems with this archaic program. Given that an 8.5% investigation rate produced a 90% violation rate, it’s frightening to think of the amount of backpay many employees are entitled to but will never see because they were not employed in one of the operations investigated.

**Olmstead, 14(c), and Sheltered Workshops**

In recent years, federal court cases have clarified and explained the application of the ADA to employment-related services for youth and adults with disabilities. The federal court in a 2012 class action that preceded a settlement with the state of Oregon, *Lane v. Kitzhaber* (also *Lane v. Brown/United States v. Oregon*), specifically addressed the application of the ADA and the Supreme Court’s Olmstead v. L.C. decision to public entities’ obligation to prevent unnecessary segregation for people with disabilities.[[2]](#footnote-2) The court explicitly held that the ADA’s integration mandate extends to employment services and prohibits the unnecessary segregation, and serious risk of unnecessary segregation, of people with disabilities, including adults and youth with disabilities.[[3]](#footnote-3)

Following this ruling, there were three landmark ADA settlement agreements entered within the span of three years that were brought by DOJ or by DOJ and private plaintiffs. Each of these court-ordered settlement agreements provided a roadmap for how state and local governments can rebalance their systems to ensure that their employment services are provided in the most integrated setting appropriate, and that people with disabilities are not unnecessarily segregated when they can and want to work in competitive integrated employment or placed at serious risk of such segregation. In the process, Oregon and Rhode Island agreed to take concrete steps to move away from excessive reliance on segregated employment settings, including those that paid 14(c) subminimum wages, towards competitive integrated employment.

**Data Dearth**

I recently heard it said that we collect data on things we view as important. And while even this briefing here today is a testament to the fact that more and more people do view 14(c) as an important topic to examine, it doesn’t change the historic fact that people with disabilities are often an under-considered demographic. For this reason, not surprisingly, there is an extreme lack of data available to offer a profile of people with disabilities who are paid subminimum wages in America. However, because WHD has recently converted its 14(c) application form to an electronic one, there is a great opportunity to collect, aggregate, and analyze information in a way that was not previously possible with paper applications.

At NCD, we are extremely gratified by this move towards more data collection on 14(c). For far too long, the facts about 14(c) have been hidden from the public and policy makers, leaving the “truth” about 14(c) to be designed by the lobbyists for the providers who have the most to gain by the retention of this decrepit program.

**Conclusion**

In 2012, when NCD released its first report on subminimum wage employment, no state or local government had eliminated the payment of subminimum wages through legislation. However, seven years later, at the time of our *New Deal to Real Deal* report release, many exciting developments demonstrate a shift in thinking and an increased understanding of the incompatibility of 14(c) with today’s disability policy goals. Maryland, Alaska, New Hampshire, and the city of Seattle passed legislation banning the payment of subminimum wages, and there is pending legislation in Connecticut, Illinois, Montana, New York, and North Carolina. Reno, Nevada implemented such a ban for city contracts; the governor of Texas signed a bill that requires state contractors to pay workers with disabilities at least minimum wages; and Washington state prohibits state agencies from paying subminimum wages. AbilityOne has asked all of its central nonprofit agencies to phase out the use of subminimum wages. And this year, SourceAmerica’s Board of Directors adopted a position to phase out and eliminate the practice of 14(c) on all its AbilityOne contracts.

With the 30th anniversary year of the ADA just a little over a month away, this conversation is particularly timely. So long as it remains legal to pay people with disabilities less than the minimum wage, little pressure exists to invest in alternate models. If paying our fellow Americans with disabilities pennies an hour under the auspices of “training” (that seemingly never ends) continues, our federal policy message to them – despite the passage of civil rights laws, despite the advancements in the education of people with disabilities, and despite our national march towards equality for all human beings, the goals of the ADA – **equality of opportunity, full participation, independent living,** and **economic self-sufficiency** – will remain aspiration-speak indefinitely.

I would be less than candid if I did not mention the fears and concerns that some parents who have children in 14(c) programs have expressed to me. Those of us who are working towards the elimination have no desire to see their loved ones unemployed or hurt by an abrupt move from this discriminatory practice. We are calling for a gradual phase out that would assure a seamless and positive transition away from 14(c), which would require resources and the collective muscle of everyone who cares about equality for all Americans.

As one young lady with Down syndrome said about 14(c) “…the ‘subminimum’ in ‘subminimum wages’ makes me feel like people think I am subhuman.” What a horrible and gut wrenching thought that in America in 2019, we still have a law that contributes to making anyone feel that they are less than equal...less than human.

Thank you for the opportunity to testify before you today.

1. <https://www.osha.gov/laws-regs/standardinterpretations/1996-02-12> [↑](#footnote-ref-1)
2. AARP v. EEOC, 267 F.Supp.3d 14, 20 (D.D.C. 2017) at 21. [↑](#footnote-ref-2)
3. 29 U.S.C. § 791. [↑](#footnote-ref-3)